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MIDDLE TEMPLE

THE
COMMON LAW
OF
ENGLAND.

THE
COMMON LAW
OF ENGLAND.

BY

W. BLAKE ODGERS, M.A., LL.D., K.C.,
DIRECTOR OF LEGAL STUDIES AT THE INNS OF COURT, GRESHAM
PROFESSOR OF LAW, AND RECORDER OF BRISTOL,

AND

WALTER BLAKE ODGERS, M.A.,
OF BALLIOL COLLEGE, OXFORD, THE MIDDLE TEMPLE AND THE
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PREFACE

TO THE SECOND EDITION.

The first edition of this book, which was published in January, 1911, is now out of print. Since its appearance there have been numerous statutes, which have affected the Common Law of England in many respects. These have rendered necessary considerable alteration of the former edition. The chapters dealing with Larceny, Perjury and Forgery have been entirely rewritten. The abolition of the Grand Jury during the war was a change which greatly affected criminal procedure. Whether or not this change is permanent, it is impossible to say; we have therefore dealt with criminal procedure as it exists to-day. The simplification of indictments has been duly noted, and a new Appendix of Indictments composed.

We have endeavoured to refer to all important statutes and decisions, which fall within the scope of this work, down to the end of last year. But we have purposely disregarded what appeared to us to be merely war-time legislation, which would not be permanent. The whole book has been thoroughly revised and brought up to date; the sub-heads in the Index—where there are more than four or five—have been arranged in alphabetical order.

We wish to acknowledge the valuable assistance which we have received in the preparation of this work and in the perusal of the proof sheets from our friend Mr. E. A. Wurtzburg, of Lincoln's Inn.

W. B. O.
W. B. O., JUNR.

15, OLD SQUARE,
LINCOLN'S INN,
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TABLE OF CONTENTS.

PAGE
Table of Cases cited xxxiii
Table of Statutes cited lxxxi

BOOK I.

INTRODUCTION.

Chapter I.

Rights and Duties . . . . 1—6
    Different kinds of law 1
    Persons 4
    Classification of Rights 5, 6

Chapter II.

Public Rights . . . . 7—16
    Personal liberty 7
    Defence of property 7
    Prevention of crime 7
    Public highways 8
    Right of access to the Courts 12
    Old Age Pensions 13
    Public duties 16

Chapter III.

Private Rights : Rights of Ownership . . . . . 17—22
    Ownership defined 17
    Ownership distinguished from possession 19
    Ownership of land, how acquired 20
    Ownership of chattels, how acquired 20
    Market overt 21

CHAPTER IV.

PAGE

PRIVATE RIGHTS: RIGHTS IN, TO OR OVER THE PROPERTY OF ANOTHER . . . . 23—32
Trusts 23
Leaseholds 24
Easements 24
Profits à prendre 26
Personal licence 26
Bailment 27
Lien 28
Mortgage 30
Pledge 31
Hypothecation 31

CHAPTER V.

PRIVATE RIGHTS: RIGHTS AGAINST PERSONS . . . . 33—38
Rights arising out of contracts 33
Rights arising out of torts 34
Choses in action 35

CHAPTER VI.

PUBLIC WRONGS . . . . 39—45
Crimes distinguished from torts 40
Acts which are both crimes and torts 44

CHAPTER VII.

REMEDIES . . . . 46—50
"No wrong without a remedy" 46
Criminal courts and remedies 47
Civil courts and remedies 48
Different kinds of relief 48

CHAPTER VIII.

THE SOURCES OF THE LAW OF ENGLAND . . . . . 51—63
Origin and growth of the common law 51
Law reports 54
Legal fictions 55
Law merchant 56
Origin and growth of equity 57
Legislation 59

CHAPTER IX.

PAGE
HOW TO ASCERTAIN THE LAW . . . . 64—75
How to extract a legal principle from the decisions . . 65
Conflicting decisions 67
How far the decision of one Court binds other Courts . . 68
Rules for the construction of statutes 69

CHAPTER X.

CUSTOMS . . . . 76—90
General local customs 76
Customs of the country 81
Customs of a manor 82
Trade customs 86

CHAPTER XI.

SUBORDINATE LEGISLATION . . . . 91—101
Provisional orders 91
Departmental orders 92
By-laws . . . . 94—101
Power to make 95
Municipal by-laws 96
By-laws under the Public Health Acts 97
By-laws made by local authorities 98
By-laws made by railway, dock, and canal companies . . 99
Confirmation of by-laws 100

BOOK II.

CRIMES.

PART I.

GENERAL PRINCIPLES OF CRIMINAL LAW.

CHAPTER I.

THE NATURE OF A CRIME . . . . . . 104—108
Definition of a crime 104
Objects of criminal proceedings 104
Right to bring an action for a tort which is also a crime . . 105
A breach of contract may be a crime 106

CHAPTER II.

PAGE
THE ELEMENTS OF A CRIME . . . . 109—130
Criminal act or omission 109
Attempt to commit a crime 110
Guilty mind . . . . 112—130
Intention and motive 112
Criminal negligence 119
Special intent and guilty knowledge 121
Malice 123
Absence of guilty intention 125
Drunkards 125
Infants 126
Lunatics 126
Persons under coercion 126
Married women 127, 128
Necessity 127
Master and servant 129

CHAPTER III.

DIFFERENT KINDS OF CRIMES AND CRIMINALS . . . . 131—135
Indictable offences and offences triable summarily . . . 132
Treasons, felonies, and misdemeanours 132
Principals and accessories 133

CHAPTER IV.

THE OBJECT AND EXTENT OF CRIMINAL JURISDICTION . 136—141
Object of criminal proceedings 136
Liability of aliens for crimes committed here 136
Liability of British subjects for crimes committed abroad . 137
Offences committed at sea 138
Theory of punishment 138
Various kinds of punishment 139

PART II.

OFFENCES AGAINST THE SOVEREIGN, THE CONSTITUTION AND THE GOOD ORDER OF THE REALM.

CHAPTER I.

TREASON . . . . 142—153
Statutes of treason 142
Overt act 147
Treason-felony, &c. 150
Misprision of treason 151
Betrayal of official secrets 151

CHAPTER II.

PAGE
SEDITION . . . . 154—159
Definition of sedition 154
Præmunire 156
Seditious words 157

CHAPTER III.

BREACHES OF THE PEACE . . . . 160—173
Unlawful assembly 160
Rout and riot at common law 162
Statutory riot 165
Other breaches of the peace 169
Forcible entry or detainer 170
Offences against the Foreign Enlistment Act, 1870 . . . 171

CHAPTER IV.

ACTS CALCULATED TO PROVOKE A BREACH OF THE PEACE . 174—186
Criminal libel and blackmail 174
Sending threatening letters 181
Challenges to fight 183
Night poaching 184
Sureties for the peace 184

CHAPTER V.

MALADMINISTRATION . . . . 187—192
Extortion and oppression 187
Refusal to act 189
Bribery and corruption 190
Offences in connection with elections 192

CHAPTER VI.

OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE . 193—210
False evidence 193
Perjury . . . . 195—200
Embracery 200
Contempt of court 201
Obstructing an officer in the execution of his duty . . . 204
Escape and rescue 205
Maintenance and champerty 206
Misprision 208
Compounding 209

CHAPTER VII.

PAGE
OFFENCES AGAINST RELIGION . . . . 211—219
Heresy and nonconformity 211
Blasphemy 213
Sacrilege and brawling 214
Bigamy . . . . 215—219

CHAPTER VIII.

OFFENCES AGAINST MORALITY AND PUBLIC DECENCY . . 220—238
Abduction 220
Procuration 222
Brothels 223
Procuring abortion 224
Indecent exposure 225
Unnatural offences 226
Obscene publications 227
Habitual drunkenness 230
Offences against the Vagrancy Acts 231
Cruelty to animals 234

CHAPTER IX.

NUISANCE . . . . 239—254
Nuisances to the health, safety or comfort of the public . . 245
Nuisances to public morals and decency 246
Nuisances to public rights of passage 247

CHAPTER X.

CONSPIRACY . . . . 255—265
Definition of the offence 255
Conspiracy distinguished from incitement 256
Meaning of the phrase "unlawful purpose" 257
Acts which when done by one man are neither crimes nor torts 259
Trade Disputes Act, 1906 261
Boycotting 264

PART III.

OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE, OR CAUSING DEATH . . . . 266—273

CHAPTER II.

MURDER . . . . 274—283
Every homicide *primâ facie* murder 274

PAGE
Malice aforethought 275
Constructive murder 277

CHAPTER III.

MANSLAUGHTER . . . . 284—296
Intentional manslaughter . . . . . . 285—288
Provocation 285
Unintentional manslaughter . . . . . . 288—296
Criminal act, causing death 288
Criminal omission to discharge duty 291
Criminal negligence, causing death 294

CHAPTER IV.

JUSTIFIABLE AND EXCUSABLE HOMICIDE . . . . 297—304
Justifiable homicide 297
Excusable homicide 301

CHAPTER V.

ACTS ENDANGERING HUMAN LIFE . . . . . 305—315
Attempt to murder 305
Conspiracy or inciting to murder 307
Concealment of birth 307
Attempt to commit suicide 309
Ill-treatment or neglect of persons unable to take care of themselves 309
Children Act, 1908 310

CHAPTER VI.

ASSAULTS . . . . 316—325
Assault and battery 316
Defences to assaults and batteries 317
Statutory assaults 320
Assaults triable summarily 323

CHAPTER VII.

RAPE AND INDECENT ASSAULTS . . . . . . 326—330

CHAPTER VIII.

ROBBERY AND PIRACY . . . . 331—335

PART IV.

OFFENCES AGAINST PROPERTY.

CHAPTER I.

PAGE

LARCENY . . . . 336—358
Definition of larceny 336, 337
What goods can be stolen 338
Possession 342
Change of possession 345
The mind of the prosecutor 346
Larceny by a trick 348
Larceny by a bailee 349
Mind of the accused 351
Larceny by finding 353
Asportation 355
Aggravated larceny 356

CHAPTER II.

EMBEZZLEMENT, &c. . . . . 359—365
Distinguished from larceny 359
Who is a clerk or servant 360
Falsification of accounts 362
Fraudulent conversion 362
Prevention of corruption 364

CHAPTER III.

FALSE PRETENCES AND OTHER FRAUD . . . . . 366—379
Obtaining goods or money by false pretences 366
What is a false pretence 367
The mind of the prosecutor 369
False pretence as distinguished from larceny by a trick . . 370
Statutory frauds 373
Obtaining credit by false pretences or fraud 374
Cheating at common law 375
Coinage offences 375
Bankruptcy offences 377

CHAPTER IV.

RECEIVING STOLEN GOODS, &c. . . . . 380—385
Proof of the theft or other illegal obtaining 381
Proof of the receipt by the accused 382
Proof of guilty knowledge 383

CHAPTER V.

PAGE
FORGERY . . . . 386—391
False documents 387
Uttering forged documents 390

CHAPTER VI.

BURGLARY AND HOUSEBREAKING . . . . . . 392—396
What is a dwelling-house 392
Breaking 393
Entry 394
Housebreaking 395
Sacrilege 396

CHAPTER VII.

ARSON AND OTHER MALICIOUS INJURIES TO PROPERTY . 397—404
Arson 397
Other malicious injuries to property 399

BOOK III.

TORTS.

CHAPTER I.

PRIVATE RIGHTS OF ACTION . . . . 405—421
Torts distinguished from crimes 405
Damnum sine injuriâ 406
Injuria sine damno 412
Injuria et damnum 415

CHAPTER II.

TORTS GENERALLY . . . . 422—439
A tort may be also a crime 422
How far is this fact a defence to an action ? 422
Violation of a private right 424
Failure to perform a private duty 426
Private duty defined 426
A private duty may arise out of a contract 429
Omission to perform a public act which causes damage to the plaintiff 433
What is a public duty 434
Discharge of right of action 437
Bankruptcy 437
Marriage 438
Statutes of Limitation 438

CHAPTER III.

PAGE
RECOVERY OF LAND . . . . 440—444
The plaintiff must recover by the strength of his own title . 441
Proviso for re-entry 443
Relief against forfeiture 444

CHAPTER IV.

TRESPASS TO LAND . . . . 445—454
The plaintiff must be in possession 446
Forcible entry 449
Justification of entry 452
Trespass *ab initio* 453

CHAPTER V.

TRESPASS TO GOODS, DETINUE AND CONVERSION . . 455—469
Trespass to goods 458
Detinue 461
Replevin 462
Wrongful distress 463
Conversion 465

CHAPTER VI.

TRESPASS TO THE PERSON . . . . 470—484
An action of assault 471
An action of battery 472
Malicious arrest 474
False imprisonment 475
Arrest by a private person 478
Arrest by a police constable 480
Liability of a justice of the peace 482
Liability of a judge 483

CHAPTER VII.

NEGLIGENCE . . . . 485—498
Definition of negligence 485
There must be a duty to the plaintiff 486
Res ipsa loquitur 489
Liability of a master for the negligence of his servant . . 490
There must be damage occasioned to the plaintiff by the defendant's neglect 493
Defences 495
Accident 496
Vis major 496
Contributory negligence 497

CHAPTER VIII.

PAGE
NUISANCE . . . . 499—514
A private nuisance distinguished from a public nuisance . 499
Remedies for each 499
Private rights arising out of public nuisances . . . 500
Liability of a highway authority 502
Private nuisances 505
The rule in *Rylands* v. *Fletcher* 508
Defences 511
How far a statute can authorise a nuisance 512

CHAPTER IX.

DEFAMATION . . . . 515—545
What words are defamatory 515
Publication 518
What do the words mean ? 519
Distinction between libel and slander 522
Is proof of special damage necessary ? 522
Truth 526
Fair comment on a matter of public interest 527
Privilege 530
Absolute privilege 531
Qualified privilege 533
Privileged reports 535
Malice 537
Words causing damage . . . . 539—544

CHAPTER X.

MALICIOUS PROSECUTION, &c. . . . . 546—553
Putting the criminal law in motion without success . . 546
Absence of reasonable and probable cause 548
Malice 549
Other malicious acts 552

CHAPTER XI.

FRAUDULENT MISREPRESENTATION . . . . . . 554—560
What the plaintiff must prove 554
Liability of directors and promoters of a company . . . 556
Liability of a partner 559

CHAPTER XII.

ACTIONS FOR LOSS OF SERVICE, &c. . . . . . . 561—564
Inducing workmen to quit their employment 561
Trade Disputes Act, 1906 563
Seduction 563

CHAPTER XIII.

PAGE
DISTURBANCE OF EASEMENTS AND OTHER RIGHTS OVER LAND AND WATER . . . 565—596
Easements . . . 565
Profits à prendre . . . 575
Personal licences . . . 578
Customary rights . . . 580
Natural rights . . . 587
Right of support . . . 587
Right to the flow of water . . . 590
Other natural rights . . . 596

CHAPTER XIV.

INFRINGEMENT OF PATENTS, COPYRIGHTS, &c. . . . 597—622
Patent rights . . . 598
Copyright . . . 604
Trade marks . . . 610
Trade names . . . 614
"Passing off" actions . . . 619

CHAPTER XV.

JOINT TORTS AND CIVIL CONSPIRACIES . . . 623—633
Joint torts . . . 623
Each tortfeasor is liable for the whole damage caused by the joint act . . . 623
No contribution between tortfeasors . . . 624
Civil conspiracies . . . 625
To commit a crime . . . 625
To induce another to break a contract . . . 626
To do an act which is not actionable if done by one person alone . . . 629
Combinations to promote trade interests . . . 630
Trade Disputes Act, 1906 . . . 632

CHAPTER XVI.

TORTS ARISING OUT OF CONTRACTS . . . 634—658
Bailments . . . 635
Innkeepers, &c. . . . 641
Carriers of goods . . . 643
Railway passengers . . . 653
Passengers' luggage . . . 655

BOOK IV.

CONTRACTS.

CHAPTER I.

PAGE
INTRODUCTORY . . . . 659—667
Essential elements of a contract 659
Unenforceable contracts 660
Classification of contracts 663

CHAPTER II.

CONTRACTS OF RECORD AND UNDER SEAL . . . 668—681
Recognizances 668
Judgments and their effects 668
Deeds 670
Contracts by corporations 671
Contracts required by statute to be under seal . . . 673
Special features of a contract under seal 676
Defences to an action brought on a covenant 678

CHAPTER III.

SIMPLE CONTRACTS . . . . 682—694
Offer and acceptance 682
Consideration defined 688
The law will not inquire into its adequacy 689
Past consideration 691
Moral consideration 693

CHAPTER IV.

CONTRACTS REQUIRED BY LAW TO BE IN WRITING . . 695—715
Parol evidence is inadmissible to vary a written contract . 695
The Statute of Frauds 697
Contracts of guarantee 700
Contracts for the sale of land 704
Contracts not to be performed within a year 708
Contracts for the sale of goods 709
What must the note or memorandum in writing contain . 712
Signature by an agent 713

CHAPTER V.

VOID AND VOIDABLE CONTRACTS . . . . . . 716—728
Duress and coercion 716
Undue influence 717
Fraud . . . . 719—722
Fraudulent misrepresentation 720
Contracts *uberrimæ fidei* 723
Mistake of fact 725

CHAPTER VI.

PAGE
ILLEGAL CONTRACTS . . . . 729—742
Contracts illegal by statute 731
Contracts against public policy 733
Maintenance and champerty 734
Lotteries and wagering contracts 735
Contracts in restraint of trade 738
Immoral contracts 741

CHAPTER VII.

BREACHES OF CONTRACT: PERFORMANCE AND DISCHARGE . 743—764
What plaintiff must prove in an action for breach of contract . 743
When must the plaintiff have performed his part of the contract? 744
Quantum meruit 748
When is time of the essence of a contract? 748
What conduct amounts to a breach on the part of the defendant 749
Defences to an action for breach of contract 751
Performance 752
Impossibility of performance 755
Rescission or variation 757
Discharge from performance of the contract 759
Accord and satisfaction 763

CHAPTER VIII.

ASSIGNMENT OF CONTRACTS AND OTHER CHOSES IN ACTION . 765—789
What are choses in action 765
Assignment of choses in action at common law 768
Covenants running with the land 769
Assignment in equity 772
Assignment under the Judicature Act 773
What is an absolute assignment within the section . . . 775
What may be assigned 779
Notice of assignment 782
Rights of the parties after an assignment 785
Equitable assignments since the Judicature Act . . . 788

CHAPTER IX.

CONTRACTS FOR THE SALE OF GOODS . . . . . . 790—808
Sale distinguished from agreement to sell 790
The price 792
Conditions and warranties 792
When does the property in the goods pass? 795
Sale in market overt 799

PAGE
Delivery of the goods 800
Acceptance of the goods by the buyer 802
Stoppage *in transitu* 804
Measure of damages in breach of a contract for sale of goods . 806

CHAPTER X.

NEGOTIABLE INSTRUMENTS . . . . 809—839
How negotiable instruments differ from other choses in action. 809
Bills of exchange 810
The holder in due course 814
The transfer of a bill to a third party . . . . . 817—820
The liability of the signatories to a bill of exchange . . 820
An accommodation bill 822
The dishonour of a bill of exchange 824
Foreign distinguished from inland bills of exchange . . 827
Cheques 827
Effect of crossing a cheque 828
Promissory notes 829
Bank notes 832
Defences in an action on a bill of exchange or promissory note 833
Absence or illegality of consideration 833
Payment of a bill or note 834
Loss of a bill or note 834
Material alteration 835
Other facts which operate as a discharge of the defendant . 836
Other negotiable instruments 837

CHAPTER XI.

PRINCIPAL AND AGENT: PARTNERSHIP . . . . . 840—860
How the relationship of principal and agent may arise . . 840
Subsequent ratification is equivalent to a prior mandate . . 842
Scope of an agent's authority 844
The remuneration of an agent 847
Secret commissions 848
Liability of an undisclosed principal 850
Various classes of agents 852
Determination of agency 855
Partnership 855
The rights of partners *inter se* 858
The authority of one partner to bind the firm 858
Liability of a partner to third persons 859

CHAPTER XII.

MASTER AND SERVANT . . . . 861—874
Definition of a servant 861

PAGE
Consideration for the contract of service 862
Grounds on which a master may lawfully dismiss his servant . 863
Contracts of apprenticeship 865
Liability at common law of employer for injuries suffered by his workmen 866
The doctrine of common employment 867
The defence *volenti non fit injuria* 867
The Employers' Liability Act, 1880 868
The Workmen's Compensation Act, 1906 870
Three different courses still open to an injured workman . 873

Chapter XIII.

LANDLORD AND TENANT . . . . 875—909
Different kinds of tenancies 875
Who may be a lessor 879
Covenants in a lease 881
Different kinds of waste 885
Rent 886
Right to distrain 889
What goods are privileged from distress 890
Assignment of leaseholds 895
Disclaimer of the tenancy 897
Termination of lease . . . . 898—902
Fixtures 902
Remedies at law 907

Chapter XIV.

CARRIAGE OF GOODS BY SEA . . . . 910—919
The contract of charter-party 910
The contract for conveyance in a general ship 912
Bills of lading 912
Liability of the shipowner 915
Freight, demurrage, and salvage 916
General and particular average 918
Bottomry and *respondentia* 918
C.I.F. and F.O.B. 919

Chapter XV.

CONTRACTS OF ASSURANCE . . . . 920—946
Insurable interest 921
Life insurance 922
Fire insurance . . . . 928—930
Marine insurance 930
Assurance against accident 937
Assurance against employers' liability 943

CHAPTER XVI.

PAGE
IMPLIED CONTRACTS AND QUASI-CONTRACTS . . . 947—958
Tacit agreements 947
Implied contracts distinguished from quasi-contracts . . 949
Money received for the use of the plaintiff 951
Penal actions 952
Foreign judgments 954
On what grounds can they be impeached here? . . . 956
Over what persons a foreign Court has jurisdiction by English law 957

BOOK V.

ADJECTIVE LAW.

PART I.

THE COURTS OF LAW.

CHAPTER I.

RELIEF . . . . 959—970
Adjective law 959
Its importance 961
Self-help 961
Self-defence 962
Expelling a trespasser 962
Removing goods improperly placed on one's own land . 963
Re-entry by an owner on his land 964
Recaption 965
Abating a private nuisance 966
Distress damage feasant 967
Domestic tribunals 968
Arbitration 969

CHAPTER II.

HISTORY OF THE COURTS OF LAW . . . . . . 971—984
Shire Meeting 972
Assize Courts 972
Manorial Courts 973
Justices of the peace 973
Court of Quarter Sessions 974

PAGE
Borough Courts 975
Courts of Common Law 976
Court of Chancery 977
Modern County Courts 978
Ecclesiastical Courts 979
Court of Bankruptcy 980
Supreme Court of Judicature 981
Court of Criminal Appeal 982

Chapter III.

CRIMINAL COURTS . . . . 985—999
Courts of Petty Sessions 985
Courts of Quarter Sessions 989
The Assizes 992
The Central Criminal Court 993
The King's Bench Division of the High Court . . . 994
The Court of Criminal Appeal 996
The House of Lords and the Court of the Lord High Steward . 997

Chapter IV.

SUPERIOR CIVIL COURTS . . . . 1000—1027
The High Court of Justice 1000
Rules of the Supreme Court 1002
The King's Bench Division 1003
Commercial causes 1004
The Masters 1005
The District Registrars 1006
The Official Referees 1007
Jurisdiction in bankruptcy 1010
Jurisdiction over election petitions 1012
The Divisional Courts 1013
The Crown side of the King's Bench Division . . . 1014
The Revenue side of the King's Bench Division . . . 1014
The Chancery Division 1014
The Probate, Divorce and Admiralty Division . . . 1016
The Court of Appeal 1019
The House of Lords 1021
The Judicial Committee of the Privy Council . . . 1022
The Chancery Court of the County Palatine of Lancaster . 1023
The Chancery Court of the County Palatine of Durham . . 1024
The Court of Railway and Canal Commission . . . 1025

CHAPTER V.

PAGE
INFERIOR CIVIL COURTS . . . . 1028—1043
Inferior Courts of Record . . . . . . 1028—1040
County Courts 1029
Borough Courts of Record 1035
The Mayor's Court of London 1035
City of London Court 1036
The University Courts 1037
The Sheriff's Court 1038
The Coroner's Court 1038
Inferior Courts not of record . . . . . 1040—1043
The Court of Petty Sessions 1040

PART II.

PROCEDURE IN CRIMINAL CASES.

CHAPTER VI.

COMMENCEMENT OF CRIMINAL PROCEEDINGS . . 1044—1059
Proceedings before justices of the peace 1047
Summary jurisdiction of justices in non-indictable cases . . 1052
Preliminary investigation by justices of the peace into cases which will be tried on indictment 1054
Depositions 1058

CHAPTER VII.

INDICTMENTS AND CRIMINAL INFORMATIONS . . . 1060—1070
Indictments 1060
Their office 1061
Modern form 1063
Criminal informations 1067

CHAPTER VIII.

THE TRIAL OF AN INDICTMENT . . . . . . 1071—1085
Arraignment and pleas 1071
Examination of witnesses 1075
Defence 1078
Order of speeches 1079
Summing-up and verdict 1081

Chapter IX.

PAGE

EVIDENCE . . . . 1086—1114
- Relevancy 1087
- Proof 1093
  - Witnesses 1094
  - Cross-examination of prisoner 1096
  - Evidence of the prisoner's wife 1097
  - Privilege of witnesses 1098
  - Corroboration 1099
  - Documentary evidence 1100
  - Circumstantial evidence 1103
  - Secondary evidence 1104
  - The burden of proof 1105
  - Admissions, presumptions and estoppels 1108
- Cogency 1111

Chapter X.

PROCEEDINGS AFTER VERDICT . . . . 1115—1128
- Sentence 1115
- Appeal 1122

PART III.

Civil Procedure.

Chapter XI.

COMMENCEMENT OF CIVIL PROCEEDINGS . . . . 1129—1148
- Right of action 1129
- Limitation of actions 1133
- Parties 1143
- Joinder of causes of action 1145

Chapter XII.

ORDINARY REMEDIES . . . . 1149—1172
- Choice of Court 1149
- Relief 1151
  - Legal remedies 1151
    - Payment of a debt with or without interest . . 1151
    - Damages 1153
    - Possession of land 1154
    - Recovery of a chattel 1154
    - A mandamus 1155
  - Equitable remedies 1156
    - An injunction 1156
    - Declaration of right or title 1161
    - The appointment of a receiver 1164
    - An account 1166
    - Specific performance of a contract 1167

CHAPTER XIII.

PAGE
EXTRAORDINARY REMEDIES . . . . 1173—1185
The writ of habeas corpus 1173
The writ of mandamus 1175
The writ of prohibition 1178
The writ of certiorari 1180
An information in the nature of a writ of *quo warranto* . . 1182
A petition of right 1182
A motion against an officer of the Court 1184

CHAPTER XIV.

THE WRIT OF SUMMONS . . . . 1186—1195
Issuing the writ 1189
Service of the writ 1190
Appearance 1191
Default of appearance 1192
Originating summons 1193

CHAPTER XV.

PROCEDURE WHERE THE WRIT IS GENERALLY INDORSED . 1196—1201
General indorsements 1196
Summons for directions 1197
Order for directions 1201

CHAPTER XVI.

PROCEDURE WHERE THE WRIT IS INDORSED SPECIALLY OR FOR AN ACCOUNT . . . . 1202—1210
Cases in which a writ can be specially indorsed . . . 1202
Precedents of special indorsements 1205
Proceedings under Order XIV. 1206
Indorsement for an account 1209

CHAPTER XVII.

PLEADINGS . . . . 1211—1235
The function of pleadings 1211
Material facts 1213
Statement of claim 1218
Defence 1222
Payment into Court 1228
Set-off and counterclaim 1230
Default of defence 1231
Reply, &c. 1231
Notice of trial: Entry for trial 1234
Discontinuance 1234

CHAPTER XVIII.

PAGE
PREPARING FOR TRIAL . . . . 1236—1253
Discovery of documents 1237
Affidavit of documents 1239
Interrogatories 1243
Answers to interrogatories 1245
Inspection of property 1247
Advice on evidence 1248
Securing the attendance of witnesses at the trial . . . 1249
Evidence on affidavit 1250
Securing the production of documents at the trial . . . 1251
Place and mode of trial 1252

CHAPTER XIX.

PROCEEDINGS IN AN ACTION FOR THE RECOVERY OF LAND . 1254—1271
History of the action for the recovery of land . . . 1255
Parties 1256
Joinder of causes of action 1258
Indorsement on writ, &c. 1260
Precedents of special indorsements 1261
Pleadings 1264
Discovery 1267
Trial 1269

CHAPTER XX.

TRIAL OF AN ACTION . . . . 1272—1280
Burden of proof 1272
Opening the case 1273
Examination of witnesses 1273
Compromise 1275
Summing up of judge 1276
Verdict 1277
Damages 1277
Judgment 1278
Costs 1279

CHAPTER XXI.

DAMAGES AND THE MEASURE OF DAMAGES . . . 1281—1322
General principles upon which damages are assessed . . 1281
Different kinds of damages 1288
Remoteness of damage 1294
Measure of damages in actions of tort 1300
Measure of damages in actions of contract 1304
Aggravation and mitigation of damages 1317

CHAPTER XXII.

PAGE
PROCEEDINGS AFTER JUDGMENT . . . . . . 1323—1336
No second action can be brought 1323
Execution 1324
Interpleader 1327
Garnishee proceedings 1328
Attachment of the debtor 1329
Procedure in the Court of Appeal 1330
Procedure in the House of Lords 1335

CHAPTER XXIII.

PROCEDURE IN THE COUNTY COURT . . . . . 1337—1350
Ordinary action . . . . 1337—1344
Summons 1337
Particulars of demand 1337
Default summons 1338
Special defences 1339
Proceedings at trial 1340
Judgment and execution 1340
Appeal 1342
Arbitrations in workmen's compensation cases . 1344—1350
Notice of accident and claim for compensation . . 1344
Application for arbitration 1345
Answer of respondent 1347
Award 1349
Appeal 1349

BOOK VI.

THE LAW OF PERSONS.

CHAPTER I.

HUSBAND AND WIFE . . . . 1352—1366
Position of a married woman at common law 1352
Criminal responsibility of married woman 1354
Her right to recover damages for a tort 1356
Liability of a husband for his wife's torts 1357
Power of a married woman to make contracts . . . 1360
Liability of a husband on his wife's contracts . . . 1360

Chapter II.

PAGE
INFANTS . . . . 1367—1378
Disabilities of an infant 1367
Criminal responsibility of an infant 1368
Liability of an infant for torts 1369
Liability of an infant on contracts 1370
Ratification and repudiation 1375

Chapter III.

LUNATICS . . . . 1379—1390
Different degrees of insanity in law 1379
Jurisdiction over person and property of lunatics . . . 1381
Criminal responsibility of lunatics 1383
Criminal responsibility of drunken persons 1385
Right of a lunatic to sue on a contract or for a tort . . 1386
Liability of lunatic for a tort 1386
Liability of lunatic on contracts 1387
Authority of agent determined by lunacy of principal . . 1388
Liability of a drunken person on contracts . . . 1389

Chapter IV.

EXECUTORS AND ADMINISTRATORS . . . . 1391—1398
Duties of personal representatives 1391
Different classes of personal representatives 1391
Grant of letters of administration 1392
Liability of personal representatives for torts of deceased . 1393
Liability of personal representatives on contracts of deceased . 1395
Effect of death on legal proceedings by and against deceased . 1397

Chapter V.

BANKRUPTS . . . . 1399—1408
Object of bankruptcy proceedings 1399
Courts having jurisdiction in bankruptcy 1400
What persons can be made bankrupt 1400
Presentment of bankruptcy petition 1401
Receiving order 1402
Adjudication order 1403
Rights and duties of trustee in bankruptcy 1403
Application for, and effect of, order of discharge . . . 1406
Legal position of undischarged bankrupt 1407

Chapter VI.

CORPORATIONS . . . . 1409—1424
Corporations sole and aggregate 1409

PAGE
Municipal, charitable, and trading corporations 1410
Chartered, prescriptive, and statutory companies 1410
Companies registered under the Companies (Consolidation) Act, 1908 1411
  Formation of 1411
  Powers of 1412
  Winding-up of 1414
Can a corporation commit a crime? 1416
Right of a corporation to sue for a tort 1417
Liability of a corporation for a tort 1417
  and on contracts 1418
Trade unions 1423

CHAPTER VII.

THE KING, HIS OFFICERS AND HIS SUBJECTS . . . 1425—1435
The King and his family 1425
The officers of the Crown 1426
British subjects 1428
  Natural-born British subjects 1428
  Naturalised British subjects 1429
  Denizens 1429
  Wives of all such persons 1430
Outlaws 1431
Aliens 1432

CHAPTER VIII.

THE LEGAL PROFESSION . . . . 1436—1460
History of the profession 1436
Inns of Court and Inns of Chancery 1437
Barristers . . . . 1439—1444
  Powers of the Inns of Court 1439
  How to become a barrister 1439
  Powers and privileges of barristers 1440
Solicitors . . . . 1444—1460
  The Law Society 1444
  How to become a solicitor 1444
  Country solicitor and London agent 1445
  Retainer by a client 1446
  Courts in which a solicitor can act as advocate . . . 1447
  Powers and privileges of solicitors 1448
  Disabilities of a solicitor 1450
  Duties of a solicitor to his client 1452
    and to the Court 1454

PAGE

Solicitors—*continued.*
  Partnerships between solicitors 1454
  Remedies of a client for breach of duty by a solicitor . 1456
  Striking a solicitor off the roll 1457
Notaries 1460

CHAPTER IX.

THE PRESENT CONDITION OF THE LAW OF ENGLAND . . 1461—1467
  The law is the heritage of the whole people, not the property of a class 1461
  Value of the study of English law 1462
  Our law neither readily accessible nor easily intelligible to laymen 1464
  Necessity and value of codification 1466

APPENDIX OF PRECEDENTS OF INDICTMENTS . . . 1468—1480

GENERAL INDEX.

TABLE OF CASES.

A.

Aaron's Reefs *v.* Twiss, 721
Abbott *v.* Weekly, 581
— *v.* Wolsey, 710, 802
Abercromby *v.* Fermoy, 581
Aberdare Local Board *v.* Hammett, 114
Abernethy *v.* Hutchinson, 606
Abingdon R. D. C. *v.* Oxford Tramways, 503
Abley *v.* Dale, 70
Abrahams *v.* Deakin, 484, 491, 846, 1417
— *v.* Dunlop, &c., Co., 860, 1454
Abrath *v.* N. E. Ry. Co., 548, 1418
Accrington, &c., Tramways Co., *In re*, 1093
Acey *v.* Fernie, 925
Acraman *v.* Morrice, 710
Acton *v.* Blundell, 410, 595
Adam *v.* Ward, 533
Adams *v.* Bankart, 859
— *v.* Clutterbuck, 700
— *v.* Coleridge, 1318
— *v.* Grane, 891
— *v.* Hagger, 887
— *v.* Wordley, 696
Adamson *v.* Jarvis, 624
Addis *v.* Gramophone Co., 865
Addison *v.* Gandasequi, 852
Adlam *v.* Colthurst, 202
Admiralty Commissioners *v.* Aberdeen Steam Trawling Co., 1102
Aeneas Macdonald's Case, 1428
African Association, Ltd., *In re*, 863
Agius *v.* Great Western Colliery Co., 1299
Agra Bank, *Ex parte*, 767, 775
Ainslie, *In re*, 706, 707
Aitken *v.* Boullen, 801
Ajello *v.* Worsley, 408, 544
Alabaster *v.* Harness, 552, 734
Alcott *v.* Millar's, &c., Ltd., 544
Alderson *v.* Maddison, 704, 862
Aldin *v.* Latimer Clark, 881
Aldous *v.* Cornwell, 762, 763, 836
Aldred's Case, 596
Aldridge *v.* G. W. Ry. Co., 930
Alexander *v.* Jenkins, 523
— *v.* N. E. Ry. Co., 526
— *v.* Steinhardt, Walker & Co., 781, 786
— *v.* Thomas, 812
Algoma Central Ry. Co. *v.* R., 69
Alina, The, 71
Allbutt *v.* General Medical Council, 532
Allcard *v.* Skinner, 718
Allen, *Ex parte*, *In re* Fussell, 898
— *In re*, *Ex parte* Shaw, 1400
— *v.* Edmundson, 826
— *v.* Flood, 257, 265, 407, 541, 551, 562, 1335
— *v.* Jackson, 733
— *v.* L. & S. W. Ry. Co., 484, 1417
— *v.* Taylor, 568
— *v.* Wood, 1256
— *v.* Wright, 479
Alliance Bank of Simla *v.* Carey, 1139
Allison *v.* Bristol M. I. Co., 934
Allkins *v.* Jupe, 848
Allsop *v.* Allsop, 472
Alston, *In re*, 1109
— *v.* Campbell, 931
Amalgamated Society, &c. *v.* Osborne, 1424
Amber Size, &c., Co. *v.* Menzel, 865
Ambergate, &c., Ry. Co. *v.* Midland Ry. Co., 968
Ambrose *v.* Kerrison, 1364, 1391
American Must Corporation *v.* Hendry, 894
Amicable Society *v.* Bolland, 927
Amory *v.* Brown, 601
Anderson *v.* Dean, 1035
— *v.* Gorrie, 418, 483, 531
— *v.* Marten, 936
Anderton, *In re*, 881
Andrew *v.* Bridgman, 948
— *v.* Cooper, *In re* Bowden, 1392
Andrews *v.* Marris, 481
— *v.* Mockford, 556
— *v.* Ramsay, 849
Anglesey, *In re* Marquis of, 1152, 1327
Anglo-Algerian S.S. Co. *v.* Houlder, 1297
Anglo-American, &c., Co. *v.* King, 603
Anglo-Italian Bank *v.* Davies, 1165
Angus *v.* Dalton, 407, 429, 588—590, 596
— *v.* McLachlan, 641
Ankerson *v.* Conelly, 1163
Annie, The, 1297
Anon. (1328), 1 Hale, 431...270
— (1633), Kelyng, 52...272
— (1673), Freem. Chy. 145...772
— (1750), Fost. 265...121, 277
— (1795), 1 Leach, 430, n....1095
Ant. Jurgens Margarinefabrieken *v.* Drefus, 806
Anthony *v.* Halstead, 1333
— *v.* Haneys, 965
Aplin *v.* Porritt, 235
Appleby *v.* Franklin, 105
— *v.* Johnson, 682

Appleton *v.* Campbell, 741
Application under the Solicitors Act, *In re* An, 1445
Arbuthnot *v.* Norton, 782
Archer's Case, 849
Arden *v.* Boyce, 1261
— *v.* Pullen, 881
Argentino, The, 1312
Argoll *v.* Cheney, 762
Arkwright *v.* Newbold, 722
Armory *v.* Delamirie, 425, 462, 467, 1109, 1287, 1305
Armstrong *v.* Stokes, 852
Arnold *v.* Blaker, 10
— *v.* Holbrook, 10, 508, 966
— *v.* Jeffreys, 1277
— *v.* Poole (Mayor of), 671, 1419
— & Butler *v.* Bottomley, 529
Arrow Shipping Co. *v.* Tyne Improvement Commissioners, 513
Ashbury Carriage Co. *v.* Riche, 843, 1419
Ashby *v.* White, 413, 435, 587, 1290
Ashenden *v.* L. B. & S. C. Ry. Co., 650
Asher *v.* Whitlock, 441, 1265, 1269
Ashford *v.* Thornton, 44
Ashley *v.* Ashley, 924
Ashmole *v.* Wainwright, 952
Ashmore *v.* Cox, 1306, 1311
Ashton *v.* Lancs. & Yorks. Ry. Co., 655
Ashworth *v.* English Card Clothing Co., 1152
— *v.* Wells, 1309
Asiatic Petroleum Co. *v.* Anglo-Persian Oil Co., 1099
Aslatt *v.* Corporation of Southampton, 1158
Asphaltic Limestone Concrete Co. *v.* Glasgow Corporation, 780
— Wood Pavement Co., *In re*, 788
Astley *v.* Reynolds, 952
Astrakhan, The, 1302
Atchinson *v.* Baker, 756
Atkins *v.* Perrin, 543
Atkinson *v.* Newcastle Waterworks Co., 421, 436
— *v.* Stephens, 1314
Atkyns *v.* Pearce, 1362
Atlee *v.* Backhouse, 717
Attenborough *v.* Solomon, 1393
Att.-Gen. *v.* Antrobus, 14, 577, 586
— *v.* Birmingham Corporation, 1159
— *v.* Brighton, &c., Supply Association, 244, 248
— *v.* Carlton Bank, 752
— *v.* Churchill, 1407
— *v.* Cole & Son, 506, 514
— *v.* Conduit Colliery Co., 411, 588
— *v.* Cox, 900
— *v.* De Winton, 623
— *v.* Dorking (Guardians of the Poor for), 245, 502
— *v.* Doughty, 596
— *v.* Gaskill, 673
— *v.* G. E. Ry. Co., 1419
— *v.* Horner, 74
— L. C. C. *v.*, 1419
— *v.* McCormack, 1014
— *v.* Manchester (Corporation of), 243
— *v.* Mathias, 570
— *v.* Murray, 923
— *v.* Nottingham Corporation, 1093
— *v.* Scott, 1163
— *v.* Shrewsbury Bridge Co., 241
— *v.* Smith, 1417
— *v.* Squire, 241
— *v.* Terry, 243, 244
— *v.* Tod Heatley, 242, 502
— *v.* Tomline, 411
— *v.* Williamson, 1014
— *v.* Wright, 15
— of the Cape of Good Hope *v.* Van Reenan, 533
— of the Commonwealth of Australia *v.* Adelaide Steamship Co., 738
Attwood *v.* Chapman, 532, 1040
Aubrey *v.* Fisher, 885
Audley's Case (Lord), 1098
Auerbach *v.* Nelson, 699
Austen *v.* Boys, 1455
Austerberry *v.* Corporation of Oldham, 10
Austin *v.* Amhurst, 577
— *v.* Bethnal Green Guardians, 672
— *v.* Dowling, 477
— *v.* G. W. Ry. Co., 485, 657
— *v.* Manchester, Sheffield, &c., Ry. Co., 650
— *v.* Newham, 878
Austin Friars Co. *v.* Spillers & Bakers, 918
Avery *v.* Bowden, 756
Aveson *v.* Lord Kinnaird, 1092
Avis *v.* Newman, *In re* Cartwright, 886
Axford *v.* Reid, 1207, 1365
Ayerst *v.* Jenkins, 741, 742
Aylesford (Earl of) *v.* Morris, 718
Aynsley *v.* Glover, 570
Ayrey *v.* British Legal, &c., Association, 925

B.

B. alias A. *v.* B., 1353
Babcock *v.* Lawson, 720
Backhouse *v.* Bonomi, 588, 589, 1138
Badeley *v.* Consolidated Bank, 784
Badische, &c., Fabrik *v.* Basle Chemical Works, 602
— *v.* Levinstein, 602
— *v.* Schott, 740
Baerlein *v.* Chartered Mercantile Bank, 1004, 1005
Bagge *v.* Mawby, 890
Bagot *v.* Chapman, 679
Bagueley *v.* Hawley, 640
Bailey *v.* Gill, 462
— *v.* Stevens, 566, 570, 576
— *v.* Sweeting, 712
— *v.* Thurston & Co., 1404
— *v.* Williamson, 15
Bailiffs of Dunwich *v.* Sterry, 451
Bailleau *v.* Victorian Society, 1460

Baillie's Case, 1443
Baily *v.* De Crespigny, 760
Bain *v.* Fothergill, 1295, 1306, 1313
Bainbridge *v.* Firmstone, 689
— *v.* Postmaster-General, 1427
— *v.* Smith, 1170
Baird *v.* Fortune, 1134
— *v.* Williamson, 411
Baker *v.* Adam, 934
— *v.* Carrick, 535, 543, 1447
— *v.* Jewell, 1349
— *v.* Sebright, 886
— *v.* Snell, 510
Ball, *Ex parte*, *In re* Shepherd, 105
— *v.* Hunt & Sons, 1349
Ballacorkish Mining Co. *v.* Harrison, 409
Ballard *v.* Dyson, 575
Bamford *v.* Townley, 506
Banbury *v.* Bank of Montreal, 703
Bancroft *v.* Heath, 843
Bandy *v.* Cartwright, 881
Bank of Australasia *v.* Breillat, 729
— *v.* Clan Line Steamers, 912
— *v.* Harding, 955, 956
— *v.* Nias, 955, 956
— England *v.* Cutler, 850
— *v.* Vagliano Bros., 813, 828
— Hindostan, &c. *v.* Smith, 763
— Montreal *v.* Exhibit and Trading Co., 830
— N. S. W. *v.* Owston, 548, 846
Banks *v.* Goodfellow, 1380
Bannatyne *v.* MacIver, 846
Bannister *v.* Hyde, 894
Barber, *In re*, 1381
— *v.* Lamb, 955
— *v.* Lesiter, 256, 625, 626
— *v.* Penley, 501
— Lionel, & Co. *v.* Deutsche Bank, 1334
Barclay *v.* Pearson, 247, 735
Baring *v.* Stanton, 849
Barker *v.* Cox, 1172
— *v.* Hodgson, 756
Barley *v.* Walford, 545
Barlow *v.* Ross, 71
Barnard *v.* Bustard, 619
Barnardiston *v.* Soame, 407, 419
Barnardo *v.* Ford, 1175
— *v.* McHugh, 1175
Barnes *v.* Lucille, Ltd., 509
— *v.* Toye, 1372
— *v.* Ward, 248, 500
Barnett *v.* Guildford (Earl of), 448
— *v.* Lambert, 1422
Barnsley, &c., Society *v.* Worsborough U.D.C., 503
Baron *v.* Husband, 688
Barr *v.* Gibson, 726
Barratt *v.* Kearns, 532
Barrett *v.* Associated Newspapers, 540
Barrow, *Ex parte*, *In re* Andrews, 693, 1407
— *v.* Arnaud, 1302
Bartlett *v.* Holmes, 1305
— *v.* Phillips, 880
— *v.* Wells, 1400
Barton *v.* Muir, 70, 75
Bartonshill Coal Co. *v.* Reid, 490, 867
Barwick *v.* English Joint Stock Bank, 722
— *v.* Thompson, 441
Basébé *v.* Matthews, 551
Bass *v.* Gregory, 569
Basten *v.* Carew, 482
Batchelor *v.* Fortescue, 487
— *v.* Sturley, 100
Bateman *v.* Hunt, 782
Bater *v.* Bater, 219, 1019
Bateson *v.* Gosling, 837
Bathurst (Borough of) *v.* Macpherson, 417
Batson *v.* King, 702
Batten *v.* Wedgwood Coal, &c., Co., 1166
Batteshill *v.* Reed, 1304
Bavius, Junr., and Sims *v.* L. & S. W. Bank, 952
Bawden *v.* London, &c., Assurance Co., 925
Baxendale *v.* G. W. Ry. Co., 952
— *v.* L. C. & D. Ry. Co., 1283
Baxter *v.* Nurse, 862
Bayley, *Ex parte*, 1184
— *v.* G. W. Ry. Co., 575
— *v.* Manchester, &c., Ry. Co., 490, 1417
Baylis *v.* Lawrence, 521
Bayne *v.* Walker, 882
Baynes *v.* Brewster, 478
— *v.* Lloyd, 881
Bazeley *v.* Forder, 1362
Beale *v.* G. W. Ry. Co., 864
Beamish *v.* Beamish, 68
Beatty *v.* Cullingworth, 1091
— *v.* Gillbanks, 162, 186
Beaufort (Duke of) *v.* Smith, 78
Beaumont, *In re*, 829
— *v.* Kaye, 1359
Beavan *v.* M'Donnell, 661, 1388
— *v.* Oxford (Lord), 783
Bechuanaland Exploration Co. *v.* London Trading Bank, 56, 90, 771, 838
Beck, *In re*, 1147
Beckett *v.* Beckett, 1279
— *v.* Ramsdale, *In re* Hodgson, 1142
Beckham *v.* Drake, 1314, 1316, 1404
Beckwith *v.* Philby, 480
Beddall *v.* Maitland, 450, 451, 1256
Bedeburn, The, 917
Bedford *v.* Ellis, 207
Bedouin, The, 933
Beeston *v.* Weate, 594
Behn *v.* Burness, 723, 911
Behrens *v.* Richards, 446
Belcher *v.* McIntosh, 884
Belding *v.* Read, 777
Belfast and Ballymena Ry. Co. *v.* Keys, 656
— Ropework Co. *v.* Bushell, 643
Belham, *In re*, 961
Bell, *In re*, 778
— *v.* Balls, 714, 847, 853
— *v.* G. N. Ry. Co., 1303
— *v.* L. & N. W. Ry. Co., 778, 786
— *v.* Midland Ry. Co., 1304
— *v.* Stocker, 1359
Bellamy *v.* Debenham, 683

Bellencontre, *In re*, 1457
Belsize Motor Co. *v.* Cox, 800
Belt *v.* Lawes, 526, 1334
Bence *v.* Shearman, 785
Benn-Davis, *In re*, 892
Bennett *v.* Cooper, 772
— *v.* Deacon, 534
— *v.* Herring, 885
Benning *v.* Ilford Gas Co., 1229
Benson *v.* Paull, 1156
Bentinck *v.* London Joint Stock Bank, 838
Bentley *v.* Metcalfe, 1294, 1295
Berdan *v.* Greenwood, 1215
Bergheim *v.* G. E. Ry. Co., 657
Bergmann *v.* Macmillan, 787
Berkeley *v.* Dimery, 1258
Bermondsey (Vestry of) *v.* Brown, 10
Berna Motors, *In re*, 612
Bernina, The, 497
Bernstein *v.* Baxendale, 649
Berridge *v.* Man On Insurance Co., 932
Berringer *v.* G. E. Ry. Co., 430
Berry *v.* DaCosta, 1305, 1317
— *v.* Jenkins, 1453
Besant *v.* Wood, 733
Besozzi *v.* Harris, 509
Bessela *v.* Stern, 1099
Bessey *v.* Windham, 680
Besterman *v.* British Motor Cab Co., 1147, 1300
Bethell, *In re*, 828
Betjemann *v.* Betjemann, 1142, 1143
Bettini *v.* Gye, 745
Betts *v.* Armstead, 504
— *v.* De Vitre, 604
— *v.* Gibbins, 624
— *v.* Thompson, 581
Bevan *v.* Carr, 709
Beverley's Case, 1388
Bibby *v.* Carter, 589
Bickett *v.* Morris, 591, 592
Bickley *v.* R., 225
Bidder *v.* Bridges, 764
Biggar *v.* Rock Life Assurance Co., 843, 926
Biggerstaff *v.* Rowatt's Wharf, Ltd., 787, 842
Biggs *v.* Bree, 1456
— *v.* Evans, 846
— *v.* G. E. Ry. Co., 526
Bignell *v.* Harpur, 1397
Bill *v.* Bament, 712, 1130
Birch *v.* Birch, 669
— *v.* Stephenson, 883
Bird *v.* Boulter, 713, 714
— *v.* Jones, 475
— *v.* Keep, 1040, 1091
Birkenhead Union (Guardians of) *v.* Brookes, 950
Birkett *v.* Birkett, 1361
Birkmyr *v.* Darnell, 701, 702
Birmingham Small Arms Co. *v.* Webb, 620
Biru Bros. *v.* Keene & Co., 607
Bishop *v.* Elliott, 903
— *v.* Trustees of Bedford Charity, 510
Biss *v.* Hygate, 703
Black *v.* Ballymena Commissioners, 594
Black *v.* Christchurch Finance Co., 490
Blackburn *v.* Smith, 951
— *v.* Vigors, 724, 845
Blackett *v.* Bates, 1171
Blackham *v.* Pugh, 535
Blades *v.* Free, 1364
— *v.* Higgs, 340, 965
Blagden *v.* Bradbear, 1171
Blake *v.* Albion Life Ass. Co., 558, 1089
— *v.* Gale, 1137
— *v.* Midland Ry. Co., 495
Blanche, *In re*, 1229
Blane *v.* Francis, 896
Blenkinsop *v.* Clayton, 711
— *v.* Ogden, 267
Blewett *v.* Jenkins, 85
— *v.* Tregonning, 80
Blewitt *v.* Hill, 434
Bligh *v.* Brent, 706
Blower *v.* G. W. Ry. Co., 645
Bloxam *v.* Sanders, 796
Blumberg *v.* Life, &c., Corporation, 845, 1450
Blundell *v.* Catterall, 14
Blyth & Fanshawe, *In re*, 1452
— *v.* Fladgate, 1455
Boaler *v.* Power, 1323, 1404
Bodlewell, The, 1302
Bolckow, Vaughan & Co. *v.* Fisher, 1245
Bolivia Exploration Syndicate, *In re*, 1432
— Republic of *v.* Indemnity, &c., Assurance Co., 915
Bolton *v.* Lambert, 844
— *v.* Liverpool Corporation, 1098
— *v.* Prentice, 1362
Bond *v.* Barrow Hæmatite Steel Co., 1093
Bonham's Case, 60, 69
Bonnard *v.* Dott, 731
— *v.* Perryman, 539, 1160
Bonomi *v.* Backhouse, 588, 589, 1138
Booreman's Case, 1439
Boosey *v.* Wood, 763
— *v.* Wright, 605
Booth *v.* Arnold, 523
— *v.* Briscoe, 1147
— *v.* Helliwell, 1416
— *v.* Howell, 98
— Steamship Co. *v.* Cargo Fleet Iron Co., 804
Bostock *v* Nicholson, 808, 1307, 1309
Boston *v.* Boston, 706
— Deep Sea, &c., Co. *v.* Ansell, 750, 864
— Fruit Co. *v.* British, &c., Insurance Co., 789
Bothamley *v.* Danby, 253
Bott *v.* Ackroyd, 482
Bottomley *v.* Brougham, 530
Boughton *v.* Knight, 1384
Boulter *v.* Kent Justices, 1040, 1180
Boulton *v.* Jones, 727
Bourdillon *v.* Roche, 1456
Bourgogne, La, 1002
Bourne *v.* Swan & Edgar, Ltd., 426, 620
Bowden, *In re*, Andrew *v.* Cooper, 1392
Bowditch *v.* Balchin, 480, 481
Bowen *v.* Anderson, 510, 901
— *v.* Hall, 262, 562

Bower v. Peate, 429
Bowker v. Evans, 1398
Bowles v. Baker, 1326
Bowman v. Secular Society, 213
Box v. Jubb, 407, 496, 509, 512, 513
Boxsius v. Goblet Frères, 518, 1447, 1453
Boyce v. Higgins, 418
Boyd, Ltd. v. Bilham, 892
Boydell v. Drummond, 699, 708
Boyse v. Rossborough, 1380
Bracegirdle v. Heald, 708
— v. Orford, 1304
Brackley v. Midland Ry. Co., 487
Bradburn v. Foley, 82
— v. G. W. Ry. Co., 1303
Bradford Corporation v. Ferrand, 950
— v. Myers, 1139
— (Mayor, &c., of) v. Pickles, 409, 410, 424, 551, 596
Bradlaugh v. Clarke, 418, 953
— v. Newdegate, 207, 552, 734
Bradley v. Carritt, 68
— v. Chamberlyn, 1204, 1214
— v. Holdsworth, 706
Bradshaw v. Beard, 1364
— v. Waterlow & Sons, 548
Braithwaite v. Foreign Hardwood Co., 761, 1311
— v. Skinner, 435
Brandao v. Barnett, 57, 87, 838
Brandt's Sons & Co. v. Dunlop Rubber Co., 783, 786, 789
Brass v. Maitland, 433
Braunstein v. Accidental Death Insurance Co., 942
Bray v. Ford, 1333
Bree v. Marescaux, 1433
Bremer's Patent, *In re*, 600
Brettel v. Williams, 859
Brice v. Bannister, 36, 768, 781
Briddon v. G. N. Ry. Co., 644
Bridge v. Grand Junction Ry. Co., 497
Briggs & Co., *In re*, 858, 859
Bright v. Hutton, 68
— v. Walker, 569
Brighton Corporation v. Packham, 15
Brinkman v. Matley, 14
Brinsmead v. Brinsmead, 616
— v. Harrison, 438, 624, 670, 1145
Brinton's, Ltd. v. Turvey, 944
Bristol, &c., Ry. Co., *In re*, 1176
— Aerated Bread Co. v. Maggs, 683
— Corp. v. Linnott, 1111
Bristow, *In re*, 787
— v. Cormican, 447
— v. Whitmore, 843
Britain v. Rossiter, 708
British Cash, &c., Conveyors v. Lamson Store, 207, 552, 734
— Columbia Saw Mill Co. v. Nettleship, 1283, 1296, 1308, 1310
— Equitable Co. v. Musgrave, 925
— Homes, &c., Corp. v. Paterson, 858
— India Steam Co. v. Commissioners, &c., 830
— Motor Syndicate v. Taylor, 1302
— Mutoscope Co. v. Homer, 891
British Mutual Banking Co. v. Charnwood Ry. Co., 722
— S. A. Co. v. Companhia de Moçambique, 446, 957, 1001
— v. De Beers, 1410, 1418
— Vacuum Cleaner Co. v. New Vacuum Cleaner Co., 616
— Wagon Co. v. Lea, 747
Brittain v. Kinnaird, 482
Britton v. Great Western Cotton Co., 436
Broad, *In re*, 1452
— v. Ham, 549
Broadbent v. Wilkes, 85
Broadhouse, *Ex parte*, 1447
Broadwood v. Granara, 454
Brocklebank v. Thompson, 581
Brocklesby v. Temperance Building Society, 846
Brockwell v. Bullock, 1387
Broder v. Saillard, 508, 514
Broderick v. L. C. C., 944
Brodie v. Brodie, 742
Brogden v. Metropolitan Ry. Co., 685
Bromage v. Prosser, 517
Bromhall v. Norton, 968
Bromley v. Smith, 1374
— R. D. C. v. Croydon Corporation, 503, 956
Brook v. Hook, 843
Brooks v. Haigh, 689
Broom v. Ritchie, 176
Broughton v. Jackson, 479
Brown, *Ex parte*, 1175
— v. Alabaster, 568
— v. Annandale, 600
— v. Chapman, 477
— v. Dean, 1334, 1342
— v. Eastern and Midlands Ry. Co., 501
— v. Hawkes, 551
— v. Langley, 696
— v. Mackenzie, 693, 1141
— v. Mallett, 513
— v. Muller, 807
— v. Pearson, 1224
— v. Powell Coal Co., 913
— v. Shevill, 891
— v. Smith, 524
— v. Tolley, 1457
— v. Turner, Brightman & Co., 911
— Shipley & Co. v. Kough, 777
Browne, *In re*, *Ex parte* Martingell, 737
— v. Dunn, 1333, 1447
Browning v. Dann, 894
Bruce, *In re*, 1109
Brune v. James, 1343
Brunsden v. Humphrey, 1324
Brunt v. Midland Ry. Co., 649
Brunton v. Electrical Engineering Corporation, 780
Bruxellesville, The, 1301, 1319
Bryant v. Clutton, 477
— v. Foot, 13
— v. Wardell, 636
Brydges v. Brydges and Wood, 1393, 1398
Bryson v. Gamage, 315

Bubb *v.* Yelverton, 737
Buccleuch (Duke of) *v.* Wakefield, 85, 89, 410, 589
Buchanan *v.* Hardy, 310
— *v.* Rucker, 956
Buck *v.* Hurst, 948
— *v.* Robson, 781
Buckhurst Peerage Case, 18
Buckle *v.* Kemp, 88
Buckton & Co. *v.* L. & N. W. Ry. Co., 648
Budd-Scott *v.* Daniell, 887
Budgett *v.* Binnington, 756
Bufe *v.* Turner, 929
Buitenlandsche Bankvereeniging *v.* Hildesheim, 685, 737
Bullen *v.* Ward, 731
Buller *v.* Crips, 810
Bullers *v.* Dickinson, 572
Bullock *v.* L. G. O. Co., 1147
Bumpus, *In re*, *Ex parte* White, 1401
Bunch *v.* G. W. Ry. Co., 657
Burberry's *v.* Cording & Co., Ltd., 619
Burbury *v.* Jackson, 1100
Burchell *v.* Clark, 71
Burden, *Ex parte*, 1316
Burder *v.* ——, 212
Burdett, *In re*, *Ex parte* Byrne, 729
Burge *v.* Ashley & Smith, Ltd., 736
Burgess *v.* Burgess, 616
Burgis *v.* Constantine, 842
Burke *v.* S. E. Ry. Co., 639
Burling *v.* Reed, 450, 963, 967
Burlinson *v.* Hall, 776, 778
Burn *v.* Carvalho, 786
Burnard *v.* Haggis, 1370
Burnett, *In re*, 1403
— *v.* Berry, 97, 100
Burns *v.* Johnston, 475
— *v.* Walford, 1262
Buron *v.* Denman, 418, 1427
Burr *v.* Smith, 532
Burridge *v.* Haines & Sons, 939
— *v.* Nicholetts, 965
Burroughs, Wellcome & Co.'s Trade Marks, *In re*, 612
Burrows *v.* Lang, 593
— *v.* Rhodes and Jameson, 624, 741
Bursill *v.* Tanner, 1359
Burton *v.* G. N. Ry. Co., 684
— *v.* Henson, 473
— *v.* Hudson, 1052
Burvill *v.* Vickers, Ltd., 870
Bushel *v.* Wheeler, 711
Bushell *v.* Hammond, 71
Bussy *v.* Amalgamated Society, &c., 552, 1424
Butcher *v.* L. & S. W. Ry. Co., 658
Butler *v.* Knight, 854
— *v.* Manchester, &c., Ry. Co., 473
Butt *v.* G. W. Ry. Co., 646
Buttemere *v.* Hayes, 706
Butterfield *v.* Forrester, 498
Buxton *v.* N. E. Ry. Co., 487
Bynoe *v.* Bank of England, 553
Byrne *v.* Boadle, 489, 1107
— *v.* Brown, 97
— *v.* Statist Co., 605, 608
— *v.* Van Tienhoven, 683

C.

C. Sharpe & Co. *v.* Nosawa & Co., 807
Cadbury's Application, *In re*, 612
Caerleon Tin Plate Co. *v.* Hughes, 715
Cahill *v.* L. & N. W. Ry. Co., 656
Caird *v.* Sime, 606
Calder *v.* Halket, 419, 484
Caledonian Insurance Co. *v.* Gilmour, 942, 1132
— Ry. Co. *v.* Mulholland, 485
— — *v.* North British Ry. Co., 71
— — *v.* Sprot, 588
Calvin's Case, 2, 1428, 1429
Calye's Case, 641
Cameron *v.* Kyte, 1427
— *v.* Young, 789, 882
Cammell *v.* Sewell, 956, 958
Campanari *v.* Woodburn, 1364
Campbell *v.* Cochrane, 1447
— *v.* Paddington Corp., 500
— *v.* Spottiswoode, 528, 529
Canada, The, 913
Cannam *v.* Farmer, 1373
Cannan *v.* Earl of Abingdon, 73
Canning *v.* Farquhar, 926
Capel *v.* Powell, 1360
Capital and Counties Bank *v.* Henty, 520
Cargill *v.* Bower, 1151, 1220
Cargo ex "Argos," 71, 72, 73, 1032
Carl Lindstroem's Trade Mark, *In re*, 612
Carlill *v.* Carbolic Smoke Ball Co., 427, 683, 685, 686
Carlish *v.* Salt, 724
Carlisle *v.* Orr, 105, 423
Carlyon *v.* Lovering, 85, 89, 591
Carnell *v.* Harrison, 1376
Carpue *v.* L. & B. Ry. Co., 1107
Carr *v.* Anderson, 663, 1431
— *v.* Fracis Times, 1001, 1432, 1433
— *v.* Hood, 408, 528
— *v.* Jackson, 852
— *v.* L. & N. W. Ry. Co., 1110
— *v.* Lynch, 698
Carratt *v.* Morley, 477, 481
Carreras, Ltd. *v.* Cunard Steamship Co., 929
Carrick *v.* Hancock, 957
Carringtons, Ltd. *v.* Smith, 718
Carrol *v.* Bird, 863
Carruthers *v.* Hollis, 461
Carter *v.* Boehm, 932
Cartwright, *In re*, Avis *v.* Newman, 886
— *v.* Green, 355, 1098
Carus Wilson's Case, 1175
Cary *v.* Kearsley, 610
Casborne *v.* Scarfe, 767
Casdagli *v.* Casdagli, 218, 1353
Case *v.* Willis, 1007
Casey *v.* Hellyer, 1264
Cassel *v.* Lancs., &c., Insurance Co., 942
Cassidy & Co. *v.* McAloon, 1204
Castellain *v.* Preston, 930
Castle *v.* Sworder, 711
Castleman *v.* Hicks, 1284
Castrique *v.* Behrens, 551

Castrique *v.* Bernabo, 826
— *v.* Imrie, 423, 956, 1093
Caswell *v.* Coare, 1308
Catchpole *v.* Ambergate, &c., Ry. Co., 433
Cathcart, *In re*, 1381
Caton *v.* Caton, 700
Cator *v.* Great Western Insurance Co. of New York, 1312
Catt *v.* Wood, 1423
Cattell *v.* Ireson, 43
Caunt *v.* Thompson, 826
Cavalier *v.* Pope, 789, 882
Cawley *v.* National Employers' Association, 941, 942
Cayzer *v.* Carron Co., 497
Cellular Clothing Co. *v.* Maxton and Murray, 618
Central Venezuela Ry. Co. *v.* Kisch, 724
Chad *v.* Tilsed, 15
Chadburn *v.* Moore, 846
Chadwick *v.* Manning, 721
— *v.* Trower, 589
Chaffers, *In re*, 1446
Challis *v.* L. & S. W. Ry. Co., 944
Challoner *v.* Robinson, 892
Chaloner *v.* Lansdown & Sons, 537
Chamber Colliery Co. *v.* Hopwood, 594
Chamberlain *v.* Boyd, 1295
— *v.* Conway, 97
— *v.* Stoneham, 690
— *v.* Williamson, 1396
— *v.* Young, 812
Chamberlain of London's Case, 96
Chamberlaine *v.* Chester, &c., Ry. Co., 434
Chambers *v.* Kingham, 899
Champion, C. G., *In re*, 1460
Chandler *v.* Webster, 757
Chaplin *v.* Brammall, 1365
— *v.* Rogers, 711
— *v.* Westminster Corporation, 243
Chapman *v.* Fylde Co., 501
— *v.* G. W. Ry. Co., 651
— *v.* Pickersgill, 426, 552
— *v.* Rothwell, 432
— *v.* Smith, 896
— *v.* Speller, 640
— *v.* Withers, 808
Chapple *v.* Cooper, 1364, 1372
Chaproniere *v.* Lambert, 705
Charles *v.* Blackwell, 755
Charles Duvall & Co. *v.* Gans, 1002
Charlesworth *v.* Faber, 933
Charman *v.* S. E. Ry. Co., 487
Charnock *v.* Merchant, 1095
Charrington & Co., Ltd. *v.* Camp, 1165
Chasemore *v.* Richards, 409, 410, 424, 595, 596
— *v.* Turner, 1142
Chastey *v.* Ackland, 11, 245, 570, 596
Chatterton *v.* Secretary of State for India, 418, 532
Cheetham *v.* Hampson, 883
Cherry *v.* Heming, 671
Chesterfield (Lord) *v.* Harris, 570, 576, 583
— *v.* Janssen, 718
Chichester Corporation *v.* Foster, 501
Child *v.* Edwards, 463, 889
— *v.* Hudson's Bay Co., 95
— *v.* Stenning, 907, 1215
Chilton *v.* London (Corporation of), 84, 582
— *v.* London and Croydon Ry. Co., 474
— *v.* Progress Printing, &c., Co., 606
Chinery *v.* Viall, 468, 636
Ching *v.* Surrey C. C., 433, 487
Chisholm *v.* Doulton, 112, 129, 242, 296
— *v.* Grant, 521
Chorlton *v.* Lings, 75
Christie *v.* Davey, 506
— *v.* Taunton, 788
Church *v.* Imperial Gas Light Co., 672, 1420
— *v.* Sage, 782
Churchill *v.* Siggers, 553
Churchward *v.* Ford, 907
Citizens' Life Assurance Co. *v.* Brown, 547, 1418
City Discount Co. *v.* McLean, 754
City of Glasgow Union Ry Co. *v.* Hunter, 412
City of Lincoln, The, 1297
Civil Service Society *v.* General Steam Navigation Co., 757
— Supply Association *v.* Dean, 620
Clack *v.* Clack, 1340
Claridge *v.* S. Staffs. Tramway Co., 466
Clark *v.* Chambers, 416, 494, 1298
— *v.* London General Omnibus Co. 495, 561
— *v.* Molyneux, 123, 530, 534, 537
— *v.* Sonnenschein, 1009
Clark's Case, 95
Clarke *v.* Army and Navy, &c., Society, Ltd., 431, 795
— *v.* Cuckfield Union, 672, 1420
— *v.* Millwall Dock Co., 891
— *v.* West Ham Corp., 655, 1314
Clatworthy *v.* Green, 1345
Claudius Ash & Co. *v.* Invicta Co., 620
Clayards *v.* Dethick, 498
Clayton *v.* Corby, 86
— *v.* Pontypridd U. D. C., 483, 1139
Clayton's Case, 754
Cleary *v.* Booth, 318
Cleather *v.* Twisden, 722, 1456
Cleaver *v.* Mutual Reserve Fund Association, 927
Clemens Horst Co. *v.* Biddell Bros., 800
Clement *v.* Cheesman, 829
Clements *v.* L. & N. W. Ry. Co., 862, 1375
Clementson *v.* Mason, 70
Clidero *v.* Scottish Accident Insurance Co., 939
Clifford *v.* Brandon, 259, 630
— *v.* Laton, 1362
— *v.* Watts, 728, 756
Climie *v.* Wood, 903, 904
Clinton *v.* J. Lyons & Co., 509
Clissold *v.* Cratchley, 458
Clough *v.* L. & N. W. Ry. Co., 646, 719, 721
Clouston & Co. *v.* Corry, 864, 1081, 1333
Clover, Clayton & Co. *v.* Hughes, 945
Clutton *v.* Attenborough, 813
Clydebank Engineering, &c., Co. *v.* Yzquierdo y Castaneda, 1315, 1432

Coaker *v.* Willcocks, 451, 968
Coates *v.* Moore, 1035
— *v.* Pacey, 848
Coatsworth *v.* Johnson, 877
Cobb *v.* G. W. Ry. Co., 655, 1297
Cobbett *v.* Grey, 472, 476
— *v.* Hudson, 481
Cobeldick, *Ex parte*, 1185
Cockburn *v.* Alexander, 1306
— *v.* Edwards, 1452
Cocking *v.* Ward, 705
Codd *v.* Cabe, 477, 481
— *v.* Delap, 956, 1207
Codling *v.* John Mowlem & Co., 870
Coe *v.* Platt, 436
Coggs *v.* Bernard, 635, 637, 638, 639, 643, 689
Coghlan *v.* Cumberland, 1332
Cohen, *In re*, 898
— *v.* Kittell, 736
— *v.* Popular Restaurants, Ltd., 895
— *v.* S. E. Ry. Co., 651
Cointat *v.* Myham, 795
Colburn *v.* Patmore, 624, 758
Coldman *v.* Hill, 638
Coldrick *v.* Partridge, Jones & Co., 867
Cole *v.* Christie, 494
— *v.* De Trafford, 489, 867, 1358
— *v.* Langford, 669
— *v.* Sury, 887
Colebeck *v.* Girdlers Co., 882
Coleham *v.* Cooke, 812
Coles *v.* Bulman, 692
— *v.* Coles, 1102
— *v.* Turner, 317
Collard *v.* Marshall, 628
Collen *v.* Gardner, 846
— *v.* Wright, 850, 1300
Collett *v.* Curling, 887
— *v.* Dickenson, 1359
Collins *v.* Blantern, 210, 679, 729, 730
— *v.* Brook, 1456
— *v.* Godefroy, 690
— *v.* Locke, 1132
Collison *v.* Warren, 1161
Colls *v.* Home and Colonial Stores, Ltd., 505, 571, 573, 1157, 1247
Colonial Bank *v.* Cady, 839
— *v.* Hepworth, 838
— *v.* Whinney, 37, 765, 767, 768, 779, 784, 1404
— of Australasia *v.* Marshall, 828
Colonial Securities Trust Co. *v.* Massey, 1332
Columbus, The, 1295
Colwell *v.* St. Pancras Borough Council, 506
Combes's Case, 840
Comfort *v.* Betts, 776, 778
Commissioner for Railways *v.* Brown, 1332
Commissioners of French Hoek *v.* Hugo, 593
— Public Works *v.* Hills, 1315
— Sewers *v.* Glasse, 966
Compania Naviera Vasconzada *v.* Churchill and Sim, 842
Compania Sansinena *v.* Houlder Bros., 1147
Concaris *v.* Duncan, 540
Concha *v.* Concha, 669
Conflans Quarry Co. *v.* Parker, 838
Connecticut Fire Insurance Co. *v.* Kavanagh, 1335
Connolly *v.* Consumers' Cordage Co., 1276, 1333
Conquest *v.* Ebbetts, 908, 1310
Consolidated Co. *v.* Curtis, 469
Constable *v.* Nicholson, 84
Conway *v.* Wade, 260, 1424
Cook *v.* Bath (Mayor of), 575
— *v.* Enchmarch, 1259
— *v.* Gordon, 1343
— *v.* Hopewell, 412
— *v.* Sprigg, 1427
— *v.* Whellock, 1408
— *v.* Wright, 689
Cooke *v.* Clayworth, 1389
— *v.* Midland G. W. Ry. of Ireland, 428, 501
— *v.* Rickman, 877
Coolgardie Goldfields, Ltd., *In re*, 1454
Coondoo *v.* Mookerjee, 409, 553, 629
Cooper, *In re*, 390
— *v.* Cooper, 1336
— *v.* Crabtree, 414, 448
— *v.* Kendall, 1141
— *v.* Lloyd, 1362
— *v.* Phibbs, 725
— *v.* Straker, 572
Coote *v.* Ford, 85, 585, 586, 587, 1229
Co-partnership Farms *v.* Harvey-Smith, 532
Cope *v.* Crossingham, 1423
— *v.* Rowlands, 732
— *v.* Sharpe, 453
Coppen *v.* Moore, 130
Copper Miners' Co. *v.* Fox, 672
Corby *v.* Hill, 433, 487
Core *v.* James, 122
Corea *v.* Peiris, 549
Corn *v.* Mathews, 1374
Cornford *v.* Carlton Bank, Ltd., 547, 1418
Cornish *v.* Abingdon, 841
— *v.* Accident Insurance Co., 927, 940
— *v.* Cleife, 884
— *v.* Stubbs, 578
Corpe *v.* Overton, 1377
Cort *v.* Ambergate, &c., Ry. Co., 468, 750
Cory *v.* Thames Ironworks, &c., Co., 1310
— & Son, Ltd. *v.* Lambton, &c., Collieries, 623, 664, 947
Cossman *v.* West, 936
Costa Rica (Republic of) *v.* Erlanger, 72
Cotman *v.* Brougham, 1419
Cotterell *v.* Jones, 409, 553, 629
Cotton *v.* Vogan & Co., 75
Couldery *v.* Bartrum, 764
Couling *v.* Coxe, 435, 553
Coulthard *v.* Consett Iron Co., 870, 1345
Coupland *v.* Maynard, 899
Couturier *v.* Hastie, 703, 791, 912
Coventry *v.* Apsley, 1138
Coventry (Earl of) *v.* Willes, 586

Coward *v.* Gregory, 1324
Cowern *v.* Nield, 1374
Cowles *v.* Gale, 749
Cowley *v.* Newmarket Local Board, 513
Cox, *Ex parte* Rev. James Bell, 1175
— *v.* Barker, 1163, 1172
— *v.* English, &c., Bank, 1332
— *v.* Glue, 449
— *v.* Hakes, 1175
— *v.* Hickman, 855
— *v.* Hoare, 712
— *v.* Midland Counties Ry. Co., 845
Coxhead *v.* Mullis, 1375
— *v.* Richards, 534
Crage *v.* Fry, 1299, 1309
Crane *v.* South Suburban Gas Co., 494
Crawford's Case, 203
Creagh *v.* Gamble, 481
Crediton (Bishop of) *v.* Bishop of Exeter, 680, 762
Creevy *v.* Carr, 1322
Critchell *v.* L. & S. W. Ry. Co., 1108, 1199
Crocker *v.* Plymouth Corporation, 789
Croft *v.* Alison, 493
— *v.* Blay, 878, 901
— *v.* Day, 617
— *v.* Lumley, 900
Cronk *v.* M'Manus, 779
Cronmire, *In re*, *Ex parte* Waud, 738
Crook *v.* Seaford (Corporation of), 673
Crosbie *v.* Hetherington, 87
Crosby *v.* Wadsworth, 707
Crosse *v.* Duckers, 908
— *v.* Welch, 890
Crossley *v.* Lightowler, 512, 575
Crosthwaite *v.* Gardner, 1396
Crouch *v.* Crédit Foncier, 90, 769, 838
— *v.* G. N. Ry. Co., 1295
— *v.* L. & N. W. Ry. Co., 651
— *v.* Tregonning, 897
Crowe *v.* Clay, 835
— *v.* Price, 1329
Crowhurst *v.* Amersham Burial Board, 967
Crumwell's Case (Lord), 96
Cuckson *v.* Stones, 864
Cuenod *v.* Leslie, 1358, 1360
Cummins *v.* Perkins, 1165
Cundey *v.* Lerwill and Pike, 617
Cundy *v.* Le Cocq, 117, 118, 122, 130
— *v.* Lindsay, 371, 727, 799
Currie *v.* Misa, 688
Curwen *v.* Milburn, 1142
Cusack *v.* L. & N. W. Ry. Co., 1343
Cuthbertson *v.* Irving, 441
Cutler *v.* L. & N. W. Ry. Co., 648
Cutter *v.* Powell, 746
Cyclists' Touring Club *v.* Hopkinson, 1411

D.

D. *v.* A. & Co., 1454
Da Costa *v.* Firth, 929
— *v.* Jones, 735
Dagg *v.* Dagg, 742
Dagnall, *In re*, 1400
Daimler Co. *v.* Continental Tyre Co., 663
Dakhyl *v.* Labouchere, 521, 529
Dalby *v.* Hirst, 82
— *v.* India Life Insurance, 724, 923
Dalton *v.* Angus, 407, 429, 588—590, 596
Dalyell *v.* Tyrer, 493
Damiens *v.* Modern Society, Ltd., 624
Dammaree's Case, 146
Dane *v.* Mortgage Insurance Corporation, 764
Dangar's Trusts, *In re*, 1454
Daniel, *In re*, 1313
— *v.* Stepney, 893
Daniels *v.* Fielding, 475
Dansey *v.* Richardson, 638, 642
Darby *v.* Harris, 391
— *v.* Ouseley, 521
Darbyshire *v.* Leigh, 441, 1265
D'Arc *v.* L. & N. W. Ry. Co., 650
Dargan *v.* Davies, 895
Darley *v.* R., 1182
Darley Main Colliery Co. *v.* Mitchell, 68, 439, 1138, 1281
Darlington Waggon Co. *v.* Harding, &c., Co., 1008
Darnel's Case, 1174
Darrell *v.* Tibbitts, 930
Dashwood *v.* Magniac, 77, 82, 885
Daubuz *v.* Lavington, 1264
Dauncey *v.* Holloway, 523, 1222
Davey *v.* L. & S. W. Ry. Co., 497
— *v.* Shannon, 861
Davidson *v.* Cooper, 836
— *v.* Gwynne, 911
— *v.* Wood, 1363
— & Co. *v.* M'Robb, 872
Davies, *In re*, 1454, 1459
— *v.* Davies, 733, 741, 742, 885, 886
— *v.* Fletcher, 477
— *v.* Gas Light and Coke Co., 1155, 1156, 1177
— *v.* Jenkins, 409, 1359
— *v.* London, &c., Insurance Co., 725
— *v.* MacHenry, 1181
— *v.* Mann, 498
— *v.* Sear, 567
— *v.* Snead, 534
— *v.* Williams, 564, 967
Davis *v.* Billing, 527
— *v.* Bromley (Mayor, &c., of), 409, 551
— *v.* Bromley U. D. C., 1334
— *v.* Cutbush, 1321, 1322
— *v.* Davis, 856
— *v.* Duncan, 528, 1320
— *v.* Freethy, 782
— *v.* Harris, 892
— *v.* Hedges, 1319
— *v.* Hyman, 860
— *v.* James, 441, 1219, 1265, 1270
— *v.* Leicester Corporation, 880
— *v.* Marrable, 571
— *v.* Petrie, 771
— *v.* Shepstone, 528, 1281, 1289, 1318, 1333
— *v.* Town Properties Corp., 881
— *v.* Treharne, 589
Davison *v.* Duncan, 536

Davison *v.* Wilson, 450, 963
Davys *v.* Richardson, 754
Dawkins *v.* Lord Paulet, 418
— *v.* Lord Rokeby, 418, 532, 533, 1102
Dawson *v.* Dyer, 881
— *v.* G. N. & City Ry. Co., 768, 779
Day *v.* Brownrigg, 615
— *v.* Longhurst, 818
— *v.* Luhke, 749
— *v.* McLea, 764
Dean *v.* Taylor, 963
Deare *v.* Soutten, 1362
Debenham *v.* Mellon, 1361
De Bernales *v.* New York Herald, 1002
Debtor, *In re* A, 718, 1399, 1448
De Bussche *v.* Alt, 847
De Cosse Brissac *v.* Rathbone, 957
De Francesco *v.* Barnum, 1375
Defries *v.* Davis, 1369
De Geer *v.* Stone, 1429
Degg *v.* Midland Ry. Co., 488
De Havilland *v.* Bowerbank, 1152
De Jager *v.* Att.-Gen. of Natal, 143
De la Bere *v.* Pearson, Ltd., 1297, 1298
Delaney *v.* Fox, 441
De Lassalle *v.* Guildford, 696, 697, 1094
De Mattos *v.* Benjamin, 736
De Medina *v.* Grove, 553
De Montaigu *v.* De Montaigu, 218, 1019
De Morgan *v.* Metropolitan Board of Works, 85, 96
Dendy *v.* Evans, 1266
— *v.* Nicholl, 1265
Dennis *v.* White & Co., 872
Dent *v.* Dunn, 754
— *v.* Maguire, 564
— *v.* Turpin, 601
Denton *v.* G. N. Ry. Co., 651
Denton's Estate, *In re*, 702
D'Epineuil, *In re*, 777
Derby (Mayor of) *v.* Derbyshire C. C., 953
Derbyshire, *In re*, 828
— *v.* Houliston, 119
Derecourt *v.* Corbishley, 479
Derry *v.* Peek, 554, 720, 722, 725, 1302, 1414
— *v.* Sanders, 84, 566
Deverill *v.* Burnell, 1306
De Vitre *v.* Betts, 604
Devonshire (Duke of) *v.* Eglin, 567
Dewar *v.* Goodman, 896
De Witte *v.* Addison, 718
Dibbins *v.* Dibbins, 844
Dibble *v.* Bowater, 888
Dickens *v.* Lee, 610
Dickinson *v.* Barber, 1386
— *v.* Barrow, 705
— *v.* Dodds, 685
— *v.* Grand Junction Canal Co., 595
— *v.* N. E. Ry. Co., 495
Dickson *v.* G. W. Ry. Co., 650
— *v.* Reuter Telegraph Co., 486, 720
Diestal *v.* Stevenson, 888
Digby *v.* The Financial News, 529
Diggle *v.* London and Blackwall Ry. Co., 1419, 1420
Dillon *v.* Balfour, 531
— *v.* O'Brien, 210
Dimes *v.* Grand Junction Canal Co., 1178
— *v.* Petley, 508, 966
Dimmock *v.* Hallett, 724
Dingle *v.* Hare, 852
Diplock *v.* Hammond, 777
Ditcham *v.* Worrall, 1375
Dixon, *Ex parte*, 852
— *In re*, 1152
— *v.* Bell, 1370
— *v.* Bovill, 769, 839
— *v.* Bradford, &c., Coal Supply Co., 900
— *v.* Fawcus, 1299
— *v.* Holden, 545
— *v.* Hurrell, 1362
— *v.* Metropolitan Board of Works, 411
— *v.* White, 588
— *v.* Yates, 796
Dobree *v.* Napier, 1432
Dobson *v.* Blackmore, 448
— *v.* Collis, 708
Doe *d.* Burrell *v.* Davis, 884
— *d.* Clarke *v.* Smaridge, 878
— *d.* Darlington (Lord) *v.* Cock, 1262
— *d.* Davies *v.* Thomas, 897
— *d.* Edney *v.* Benham, 887
— *d.* Harrison *v.* Murrell, 879
— *d.* Harrop *v.* Green, 901
— *d.* Hudson *v.* Leeds, &c., Ry. Co., 454
— *d.* Mann *v.* Walters, 844
— *d.* Matthewson *v.* Wrightman, 901
— *d.* Price *v.* Price, 901, 902
— *d.* Rigge *v.* Bell, 879
— *d.* Rochester (Bishop of) *v.* Bridges, 436
— *d.* Wetherell *v.* Bird, 884
— *v.* Dyeball, 1265
— *v.* Kemp, 1088
— *v.* Mizem, 901
— *v.* Paul, 888
— *v.* Phillips, 900
— *v.* Price, 900
— *v.* Rollings, 900
— *v.* Samples, 1102
— *v.* Thomas, 899, 902
— *v.* Wells, 900
— *v.* Wilkinson, 901
Doering *v.* Doering, 788
Doey *v.* L. & N. W. Ry. Co., 649
Doggett *v.* Waterloo Taxicab Co., 871
Doherty *v.* Allman, 1157, 1159
Donald *v.* Suckling, 462
Donellan *v.* Read, 708
Donelly *v.* Popham, 844
Donovan *v.* Laing Wharton Syndicate, 493
Dooby *v.* Watson, 1456
Doolan *v.* Midland Ry. Co., 648
Doorman *v.* Jenkins, 637
Dornira, The, 917
Doswell *v.* Impey, 484
Dott *v.* Bonnard, 1207
Dougal *v.* McCarthy, 878
Doughan *v.* Macpherson, 725

Doughty *v.* Bowman, 770
Douglas, *In re*, 1175
— *v.* Forrest, 957
Douglass *v.* Rhyl U. D. C., 748
Dowden & Pook, Ltd. *v.* Pook, 739, 740
Downe *v.* Fletcher, 1204, 1207, 1365
Dowse *v.* Gorton, 1397
Doxford *v.* Sea Shipping Co., 1447
Doyle *v.* Kaufman, 1191
Dramburg *v.* Pollitzer, 851
Drew *v.* Nunn, 1363, 1364, 1388
— & Co. *v.* Josolyne, 781, 787
Dreyfus *v.* Peruvian Guano Co., 1302
Drinkwater *v.* Goodwin, 852
Driver *v.* Broad, 706
Drughorn, Ltd. *v.* Rederiaktiebolaget Transatlantic, 842
Drummond *v.* Van Ingen, 795
Dublin, &c., Ry. Co. *v.* Black, 1376
— Wicklow and Wexford Ry. Co. *v.* Slattery, 489
Dubois *v.* Keats, 551
Dubowski *v.* Goldstein, 740
Duchess of Kingston's Case, 669, 958
Duck *v.* Mayeu, 624
Duckworth *v.* Johnson, 494, 495
Dudden *v.* Clutton Union, 594
Dudgeon *v.* Thomson, 602
Dudley, *In re*, 1184
Dugdale *v.* Lovering, 664, 947
— *v.* R., 110
— *v.* Robertson, 589
Duke *v.* Andrews, 682
Dulieu *v.* White, 494, 1302
Dumbelton *v.* Williams, 1229
Dumsday *v.* Hughes, 1216
Duncan, *In re*, Terry *v.* Sweeting, 437, 1395
Dundas *v.* Dutens, 767
Dundee (Magistrates of) *v.* Hunter, 581
Dungarvan Guardians *v.* Mansfield, 581
Dunkley & Son, *In re*, 781
Dunlop *v.* Higgins, 683
Dunlop Pneumatic Tyre Co. *v.* Maison Talbot, 541, 543, 1159
— *v.* Selfridge & Co., 842
Dunn *v.* Birmingham Canal Co., 411
— *v.* Bucknall Bros., 1295, 1312, 1434
— *v.* Devon Newspaper Co., 1278
— *v.* Newton, 852
Dunning *v.* Swetman, 247
Dunster *v.* Hollis, 882
Dunwich (Bailiffs of) *v.* Sterry, 459
Durham *v.* Durham, 1388
Durham Bros. *v.* Robertson, 778, 781, 788
Durose *v.* Wilson, 224
Durrant *v.* Ecclesiastical Commissioners, 951
Dutch West India Co. *v.* Henriques, 1415
Duval & Co. *v.* Gans, 1002
Dyce *v.* Hay, 581
Dyer *v.* Munday, 324
Dynevor *v.* Tennant, 575
Dysart (Earl of) *v.* Hammerton, 503, 1162
Dyson *v.* L. & N. W. Ry. Co., 100, 122
Dyte *v.* St. Pancras Guardians, 672

E.

E. Clemens Horst Co. *v.* Biddell Bros., 800
E. G., *In re*, 1389
Eager, *In re*, Eager *v.* Johnstone, 1001
Earl *v.* Lubbock, 431, 486
Earle *v.* Kingscote, 438, 722, 1358
— *v.* Oliver, 693
Earlsferry (Magistrates of) *v.* Malcolm, 581
Earnshaw *v.* Earnshaw, 1042
East and West India Dock Co., *Ex parte*, *In re* Clarke, 898
East Indian Ry. Co. *v.* Kalidas Mukerjee, 1107
East Stonehouse U. D. C. *v.* Willoughby, 1137
Eastern Counties Ry. Co. *v.* Broom, 473, 474
Eastern & S. A. Telegraph Co. *v.* Cape Town Tramways Co., 412
Eastgate, *In re*, *Ex parte* Ward, 1405
Eastland *v.* Burchell, 1362
Eastman Co.'s Trade Mark, *In re*, 612
Easton Estate Co. *v.* Western Waggon Co., 893
Ecclesiastical Commissioners *v.* Kino, 572
— *v.* N. E. Ry. Co., 1138, 1286
— *v.* Wodehouse, 880
Edelstein *v.* Schuler & Co., 56, 90, 771, 838
Edelsten *v.* Edelsten, 620
Edgeware Highway Board *v.* Harrow Gas Co., 730
Edgington *v.* Fitzmaurice, 555, 721
Edison Bell Co. *v.* Smith, 604
Edmondson *v.* Birch & Co., Ltd., 518
Edmunds *v.* Bushell, 845
— *v.* Edmunds, 782, 1328
Educational Co. of Ireland *v.* Fallon, 609
Edwardes *v.* Barrington, 875
Edwards *v.* Brown, 678
— *v.* Carter, 1376
— *v.* Fox, 892
— *v.* Jenkins, 582
— *v.* Liverpool (Corporation of), 1181
— *v.* L. & N. W. Ry. Co., 491, 1417, 1418
— *v.* Midland Ry. Co., 547
— *v.* Walters, 680, 836
Edwick *v.* Hawkes, 170
Eede, *In re*, 1459
Egerton *v.* Earl Brownlow, 18, 733
Eggington *v.* Mayor of Lichfield, 477
Egremont Burial Board *v.* Egremont Iron Co., 1267
Eke *v.* Hart Dyke, 944
Elbinger *v.* Armstrong, 1311
Eldridge *v.* Stacey, 894
Electric Supply Stores *v.* Gaywood, 644
Eley *v.* Positive Life Assurance Co., 688, 708

Eliza, The, 919
Ellard *v.* Llandaff, 1170
Ellesmere Brewery Co. *v.* Cooper, 680
Ellinger & Co. *v.* Mutual, &c., Co. of New York, 939
Elliot *v.* N. E. Ry. Co., 588
Elliott *v.* Crutchley, 755, 757
— *v.* Royal Exchange Ass. Co., 1132
Ellis *v.* Allen, 1108
— *v.* Bedford (Duke of), 1163
- *v.* Goulton, 854, 1449
— *v.* Loftus Iron Co., 451, 460
v. Manchester Carriage Co., 567
v. Pond, 848
— *v.* Sheffield Gas Consumers' Co., 490, 511
— *v.* Wadeson, 860
Elmore *v.* Kingscote, 712
Elphinstone *v.* Monkland, &c., Co., 1316
Elsee *v.* Gatward, 689
Eltham *v.* Kingsman, 735
Elwes *v.* Maw, 904
Elwood *v.* Bullock, 78, 585
Emary *v.* Nolloth, 119, 130
Emblen *v.* Myers, 1304
Embrey *v.* Owen, 591
Emden *v.* Carte, 1407
Emerson *v.* Maddison, 1136
Emery, George D., Co. *v.* Wells, 1278
Emma Silver Mining Co. *v.* Lewis, 558
Emmens *v.* Elderton, 1314
— *v.* Pottle, 519
Emmett *v.* Norton, 1362
Empson *v.* Soden, 885, 904
Engelhart *v.* Farrant & Co., 491
Engeil *v.* Fitch, 1313
England *v.* Davidson, 690
— *v.* Marsden, 948
English *v.* Sewell, 501
English and Colonial Produce Co., *In re*, 665, 1422
English and Foreign Credit Co. *v.* Arduin, 682
English and Scottish Co., Ltd. *v.* Brunton, 780
English Bank of the River Plate, *In re*, 1306
Enoch and Zaretzky, Bock & Co., *In re*, 1086, 1274
Enraght *v.* Lord Penzance, 1179
Entick *v.* Carrington, 449, 477, 973, 1426
Erlanger *v.* New Sombrero Phosphate Co., 559
Errington's Case, 278
Erskine *v.* Adeane, 697
Esposito *v.* Bowden, 760
Essex *v.* Daniell, 1313
Ethel, *In re*, 19
Etherington and Lancs., &c., Insurance Co., *In re*, 939
Evans, *Ex parte*, 1440
— *In re*, 1330
— *v.* Benyon, 1331
— *v.* Bignold, 921, 923
— *v.* Edmonds, 720
— *v.* Harries, 1293
— *v.* Hoare, 699
Evans *v.* Levy, 895, 1164
— *v.* L. C. C., 1416
— *v.* Manchester, &c., Ry. Co., 485, 1163
— *v.* Roberts, 707
— *v.* Roe, 696
— *v.* Stein & Co., 1433
— *v.* Walton, 562, 1370
— *v.* Ware, 1375
— *v.* Wills, 1341
— *v.* Wright, 895
Everett *v.* Desborough, 925
Ex parte Agra Bank, 767, 775
— Allen, *In re* Fussell, 898
— Ball, *In re* Shepherd, 105
— Barrow, *In re* Andrews, 693, 1407
— Bayley, 1184
— Broadhouse, 1447
— Brown, 1175
— Burden, 1316
— Cobeldick, 1185
— Cox, Rev. James Bell, 1175
— Dixon, 852
— East and West India Dock Co., *In re* Clarke, 898
— Evans, 1440
— Grant, *In re* Plumbly, 89
— Hall, 772, 774
— James, 1012
— Jones, *In re* Jones, 1400
— Kibble, *In re* Onslow, 1376
— Lewis, 15
— Lovering, *In re* Jones, 898
— Lyne, 478
— Martin, 1341
— Mgomini, 418, 1427
— Morgan, *In re* Simpson, 677
— Moss, 781
— Nash, 1176
— Nichols, 772
— O'Brien, William, 157
— Pollard, 1069
— Pulbrook, 180
— Pyke, *In re* Lister, 736
— Rawlings, 772
— Reynolds, 1098
— Seymour and Michael Davitt, 154
— Shellard, 783
— Simmons, 1012
— Smyth, 1179
— Tennant, 855
— Tootell, 812
— Unity Banking Association, 1400
— Vine, 437, 1407, 1408
— Voisey, *In re* Knight, 878
— Walton, *In re* Levy, 898
— Woodhall, 1175
Excester (Earl of) *v.* Smith, 96
Exchange Bank of Yarmouth *v.* Blethen, 671
Exchange Telegraph Co. *v.* Gregory, 5, 598, 627

F.

Faber *v.* Gosworth U. D. C., 1163
Fabian *v.* Nunn, 705

Fair *v.* L. & N. W. Ry. Co., 1303
Fairclough *v.* Marshall, 1160
Fairlie *v.* Fenton, 714, 851
Fairman *v.* Oakford, 863
Falcke *v.* Gray, 1168, 1169
Falmouth (Lord) *v.* George, 77, 79
Falvey *v.* Stanford, 1289, 1334
Famatina, &c., Corp., *In re*, 848
Farebrother *v.* Simmons, 714
Farina *v.* Fickus, *In re* Fickus, 704
— *v.* Home, 711
Farley *v.* Danks, 475, 552
Farman, *In re*, 1456
Farnham, *In re*, 1400
Farquhar *v.* Newbury R. D. C., 9
Farquharson *v.* King, 720, 858
Farrar *v.* Cooper, 859
Farrer *v.* Lacey, 854
Farrington *v.* Forrester, *In re* Jones, 1376
Faviell *v.* Eastern Counties Ry. Co., 1449
Fawcett *v.* Cash, 862
— *v.* Smethurst, 1370
— *v.* York and North Midland Ry. Co., 436
Fawkes *v.* Lamb, 87
Feather *v.* R., 1183
Feise *v.* Aguilar, 934
Fell *v.* Knight, 454
Felthouse *v.* Bindley, 684
Fenn *v.* Grafton, 392
Fenna *v.* Clare & Co., 500
Fenner *v.* Blake, 899
Fenton *v.* Thorley, 71
Ferens *v.* O'Brien, 355
Feret *v.* Hill, 679, 741
Ferguson *v.* Earl of Kinnoull, 435
— *v.* Mahon, 957
— *v.* Nightingale, 885
Fickus, *In re*, Farina *v.* Fickus, 704
Fidelity, &c., Co. *v.* Mitchell, 941
Field *v.* Adames, 892
— *v.* Bennett, 1002
— *v.* Megaw, 775, 777
— *v.* Receiver of Metropolitan Police, 163, 400
Fielding *v.* Morley Corporation, 70, 1139
Filburn *v.* People's Palace Co., 509
Filby *v.* Hounsell, 697
Finburgh *v.* Moss' Empires, Ltd., 1418
Fine Art Society *v.* Union Bank, 839
Finlay *v.* Chirney, 1396
Fish *v.* Kelly, 427, 486
Fisher *v.* Apollinaris Co., 210
— *v.* Bridges, 742
— *v.* Liverpool Marine Insurance Co., 933
— *v.* Owen, 1246
— *v.* Prowse, 487, 500
— *v.* Tully, 679
Fitch *v.* Rawling, 581, 585
— *v.* Snedaker, 686
Fitton *v.* Accidental Death Insurance Co., 941
Fitzgerald *v.* Firbank, 449, 508, 579, 580
— *v.* Stewart, 778
Fitzhardinge (Lord) *v.* Purcell, 9, 467, 578
Fitzjohn *v.* Mackinder, 551
Fitzmaurice *v.* Bayley, 698
Fitzpatrick *v.* Kelly, 289
Fitzroy *v.* Cave, 778, 782
Fivaz *v.* Nicholls, 730
Fleet *v.* Murton, 852
Fleetwood *v.* Hull, 770
Fleming *v.* Bank of New Zealand, 688, 828, 844
— *v.* Dollar, 527
— *v.* Hislop, 506
— *v.* Loe, 786
Fletcher *v.* Marshall, 951
— *v.* Smith, 411
— *v.* Tayleur, 1306
Flight *v.* Bolland, 1373
— *v.* Booth, 724
Flitcroft *v.* Fletcher, 1268
Flower *v.* L. & N. W. Ry. Co., 1374
— *v.* Sadler, 733
Floyd *v.* Barker, 419
— *v.* Gibson, 1333
Flureau *v.* Thornhill, 1306, 1313
Foakes *v.* Beer, 762, 764
Folkestone Corp. *v.* Brockman, 9
Forbes *v.* Aspinall, 934
— *v.* Cochrane, 2
— *v.* Ecclesiastical Commissioners, 581
— *v.* Samuel, 953, 1140
Ford, *In re*, 1208
— *v.* Foster, 619
— *v.* Stier, 717
— *v.* Yates, 665
Forder *v.* G. W. Ry. Co., 648
Ford's Hotel Co. *v.* Bartlett, 970
Fores *v.* Johnes, 741
Forget *v.* Ostigny, 737
Formby Bros. *v.* E. Formby, 842
Forrest *v.* Todd, 1009
Forsdike *v.* Stone, 1334
Forster *v.* Baker, 781
— *v.* Farquhar, 1292
— *v.* Rowland, 1450
Fortescue *v.* Barnett, 785
Foster *v.* Charles, 863
— *v.* Dawber, 764
— *v.* Mackinnon, 678, 726
— *v.* Mackreth, 859
— *v.* Reeves, 877
— *v.* Warblington U. D. C., 503
— & Sons, Ltd. *v.* Suggett, 739
Fotherby *v.* Metropolitan Ry. Co., 432, 1155, 1156
Foulkes *v.* Metropolitan District Ry. Co., 430, 652
Foundling Hospital *v.* Crane, 671
Fowler *v.* Hollins, 468
— *v.* Padget, 109
— *v.* Sanders, 9, 243, 512
— *v.* Scottish Equitable Co., 920
Fowlers *v.* Walker, 572
Fowles *v.* G. W. Ry. Co., 652
Fox *v.* Jolly, 443
Foxhall *v* Barnett, 476
Foxwell *v.* Van Grutten, 1165, 1388
France *v.* Gaudet, 1301
Francis *v.* Bruce, *In re* George, 836
Frank Warr & Co. *v.* L. C. C., 875
Fraser *v.* Fraser, 1208

Fraser *v.* Telegraph Construction Co., 913
Fray *v.* Blackburn, 418
— *v.* Vowles, 413, 854
Frayes *v.* Worms, 956
Frearson *v.* Loe, 602, 604
Fred. Drughorn, Ltd. *v.* Rederiaktiebolaget Transatlantic, 842
Fred. Wilkins & Bros., Ltd. *v.* Weaver, 562
Freeman *v.* Jeffries, 950
— *v.* Rosher, 491
Freeth *v.* Burr, 761
French *v.* Howie, 1361
Freston, *In re*, 202, 1184
Fricker *v.* Van Grutten, 1446
Friend *v.* Young, 753
Frieze-Green's Patent, *In re*, 599
Fritz *v.* Hobson, 409, 500
Frost *v.* Aylesbury Dairy Co., 794, 1294
— *v.* Chester (Mayor of), 1182
— *v.* Knight, 750, 1132
— *v.* London Joint Stock Bank, 413, 521
Frühauf *v.* Grosvenor & Co., 1214
Fry *v.* Smellie, 842, 846
Fryer *v.* Ewart, 443
— *v.* Kinnersley, 538
Fuller *v.* Blackpool Winter Gardens Co., 605
— *v.* Glyn, Mills, Currie & Co., 1110
Fulton *v.* Andrew and Wilson, 1451

G.

G. & C. KREGLINGER *v.* New Patagonia Co., 68
Gabriel, Thomas, & Sons *v.* Churchill & Sim, 853
Gahan *v.* Lafitte, 420
Gale *v.* Bates, 883
Gallwey *v.* Marshall, 524
Gange *v.* Lockwood, 884
Gardner *v.* Ingram, 901
— *v.* Lucas, 72
— *v.* Walsh, 836
— Peerage Case, 1093
Garland *v.* Jacomb, 859
Garnett, *In re*, 1100
— *v.* Ferrand, 420, 473
Garrells *v.* Alexander, 1093
Garret *v.* Taylor, 562
Gas Light and Coke Co. *v.* Hardy, 893
— *v.* Towse, 881
— *v.* Turner, 679
Gascoigne *v.* Gascoigne, 677, 1111
Gaskell and Walters, *In re*, 1431
Gates *v.* Meredith, 1386
Gateward's Case, 84, 582, 583
Gathercole *v.* Miall, 1321
Gatty *v.* Farquharson, 1334
Gaunt *v.* Fynney, 507
Gaved *v.* Martyn, 89, 591
Gayford *v.* Nicholls, 460, 493
Gebrüder Naf *v.* Ploton, 1248
Geddis *v.* Proprietors of Bann Reservoir, 417
Gee *v.* Pritchard, 604
Geen *v.* Herring, 1258
Geilenger *v.* Gibbs, 1446
Gelen *v.* Hall, 483
Gelmini *v.* Moriggia, 463
General Billposting Co., Ltd. *v.* Atkinson, 750
— Council of the Bar *v.* Inland Revenue, 752
— Finance, &c., Co. *v.* Liberator Building Society, 1256
— Railway Syndicate, *In re*, 720
Genforsikrings Atkieselskabet *v.* Da Costa, 737
Gentel *v.* Rapps, 100
Gentry, *In re*, 1402
George, *In re*, Francis *v.* Bruce, 836
— and Goldsmiths, &c., Association, *In re*, 945
— *v.* Clagett, 851
— *v.* Davies, 863
— *v.* Skivington, 431, 485
— *v.* Thyer, 1109
— D. Emery Co. *v.* Wells, 1278
Gerhard *v.* Bates, 427, 556, 688
Gerrard *v.* Boden, 767
Gerson *v.* Simpson, 625, 1414
Gibbons *v.* Pepper, 318
— *v.* Proctor, 686
Gibbs *v.* Guild, 1142
Giblan *v.* National Amalgamated, &c., 541, 563, 627, 633
Gieve, *In re*, 737
Gilbert *v.* Sykes, 735, 742
Gilbey *v.* G. W. Ry. Co., 1092
Giles *v.* Taff Vale Ry. Co., 651
— *v.* Walker, 428, 509
Gill *v.* Dickinson, 589
— *v.* Manchester, Sheffield, &c., Ry. Co., 648
Gillard *v.* Cheshire Lines Committee, 876
Gillette Safety Razor Co. *v.* Gamage, 603
Ginesi *v.* Cooper, 739
Gingell, &c., Ltd. *v.* Stepney B. C., 10
Ginnett *v.* Whittingham, 1037
Giraud *v.* Richmond, 696
Gladwell *v.* Steggall, 430
Glaholm *v.* Hayes, 911
Glasbrook *v.* Owen, 1009
Glasdir Copper Works, Ltd., *In re*, 903
Glasgow, The, 918
Glasier *v.* Rolls, 721
Glasscock *v.* Balls, 832
Gledhill *v.* Hunter, 440, 1259
Glenwood Lumber Co. *v.* Phillips, 875
Gloucester Municipal Election Petition, *In re*, 844
Glover *v.* Chapman, 574
— *v.* L. & S. W. Ry. Co., 1297
Gluckstein *v.* Barnes, 721
Glynn *v.* Thomas, 465, 717
Godard *v.* Gray, 956
Goddard *v.* O'Brien, 764
Godwin *v.* Francis, 850, 1300
Goff *v.* G. N. Ry. Co., 484, 1417
Golding *v.* Royal London, &c., Co., 928
— *v.* Stocking, 253
Goldrei *v.* Sinclair, 1145
Goldschmidt *v.* Oberrheinische Metallwerke, 1327

Goldstein *v.* Salvation Army Ass. Soc., 920
Gomersall, *In re*, 816
Gonsky *v.* Durrell, 892
Good *v.* Cheeseman, 764
Goode *v.* Harrison, 1376
Goodhart *v.* Hyett, 568
Goodman *v.* Mayor of Saltash, 84, 583
Goodson *v.* Baker, 737
— *v.* Grierson, 737
Goodwin *v.* Cremer, 412
— *v.* Robarts, 57, 89, 771, 838, 839
Gordon *v.* Silber, 641
— *v.* Street, 727
Gore *v.* Gibson, 1389
Gorgier *v.* Mieville, 838
Gorham *v.* Bishop of Exeter, 212, 1179
Gorman *v.* Moss Empires, Ltd., 1418
Gorringe *v.* Irwell, 777, 784, 785
Gorris *v.* Scott, 437
Gort (Viscount) *v.* Rowney, 1146
Gosbell *v.* Archer, 951
Gosling *v.* Veley, 94
Goss *v.* Lord Nugent, 667, 696, 758, 759, 1094
Gott *v.* Gandy, 882
Gould *v.* Gapper, 1179
Govier *v.* Hancock, 1362
Gower *v.* Couldridge, 1148
— *v.* Tobitt, 1009
Graham *v.* Allsopp, 882
— *v.* Chapman, 117
— *v.* Musson, 714
Grainger *v.* Hill, 477
Granger *v.* George, 1137
Grant, *Ex parte*, *In re* Plumbly, 89
— *v.* Gold Exploration, &c., Ltd., 559, 848
— *v.* Owners of S.S. Egyptian, 1301, 1319
— *v.* Secretary of State for India, 418, 533
— *v.* Thompson, 552
Graves *v.* Weld, 902
Gray *v.* Bartholomew, 1278
— *v.* Johnston, 413
— *v.* Smith, 705
Great Laxey Mining Co. *v.* Clague, 433
Great Northern Fishing Co. *v.* Edgehill, 421
G. N. Ry. Co. *v.* Behrens, 649
— *v.* Palmer, 655
— *v.* Shepherd, 656
— *v.* Swaffield, 643, 841
— *v.* Witham, 684
Great Western, &c., Dairies, Ltd. *v.* Gibbs, 740
— Insurance Co. *v.* Cunliffe, 849
G. W. Ry. Co. *v.* Bennett, 589
— *v.* Cefn Cribbwr Brick Co., 575
— *v.* Goodman, 657
— *v.* Helps, 863
— *v.* London and County Bank, 828
— *v.* Pocock, 655
— *v.* Redmayne, 1308
Greaves *v.* Ashlin, 665
— *v.* Greenwood, 442, 1270
Grébert-Borgnis *v.* Nugent, 1283, 1311
Green *v.* All Motors, Ltd., 635
— *v.* Archer, 545
— *v.* Button, 545
— *v.* Eales, 884
— *v.* Elgie, 477
— *v.* Humphreys, 1140
— *v.* Thompson, 1371
Greenhow *v.* Ilsley, 587
Greenlands *v.* Wilmshurst, 534, 623
Greenough *v.* Gaskell, 1098
Greenslade *v.* Dower, 859
Gregory *v.* Duke of Brunswick, 259, 629, 630
Grenfell *v.* Dean, &c., of Windsor, 782
Griffin *v.* Coleman, 480
Griffith *v.* "Penrhyn Castle" Owners, 871
— *v.* Tower Publishing Co., 780
Griffiths *v.* Dudley (Earl of), 869
— *v.* Fleming, 921, 923, 1365
— *v.* School Board of Ystradyfodwg, 754
Grinham *v.* Willey, 479
Grinnell *v.* Wells, 408
Grœnvelt's Case, 489
Grosvenor Hotel Co. *v.* Hamilton, 881, 907
Groves *v.* Lord Wimborne, 436
Grunnell *v.* Welch, 890
Guardians of Birkenhead Union *v.* Brookes, 950
— Pontypool *v.* Buck, 1365
Guiard *v.* De Clermont, 957
Guild & Co. *v.* Conrad, 703
Guille *v.* Swan, 416
Gull *v.* Lindsay, 703
Gully *v.* Smith, 107
Gundry *v.* Sainsbury, 552
Gunnis *v.* Erhardt, 713
Gunter *v.* Astor, 562
— *v.* Halsey, 704
Gurney, *In re*, 1208
— *v.* Womersley, 818
Gurney's Case, 199
Gwatkin *v.* Bird, 1165, 1259
Gwilliam *v.* Twist, 841, 847
Gwinnell *v.* Eamer, 510
Gyles *v.* Wilcox, 610

H.

Haddan *v.* Lott, 542, 1294
Haddrick *v.* Heslop, 550
Hadesden *v.* Gryssel, 467
Hadley *v.* Baxendale, 807, 1283, 1295, 1296, 1307
Hagedorn *v.* Oliverson, 843
Haigh *v.* North Bierley Union, 1120
— *v.* Sheffield (Town Council of), 116
— *v.* West, 582
Haines *v.* Busk, 848
Halbot *v.* Lens, 850
Hale, *In re*, Lilley *v.* Foad, 845
Hales *v.* Kerr, 487, 1088
— *v.* Petit, 109
Halestrap *v.* Gregory, 28, 1298
Halford *v.* Kymer, 923
Hall, *Ex parte*, 772, 774
— *In re*, 745, 927

Hall *v.* Barrows, 619
— *v.* Bristol (Mayor, &c., of), 407
— *v.* Comfort, 1264
— *v.* Cox, 247
— *v.* Dyson, 689
— *v.* Eve, 1215
— *v.* Ewin, 896
— *v.* Hayman, 936
— *v.* Hollander, 564, 1370
— *v.* Lichfield Brewery Co., 407
— *v.* London, City of, Brewery Co., 881
— *v.* Nottingham, 80, 581
— *v.* Warren, 1388
— *v.* Wright, 756, 1396
Hallas *v.* Robinson, 772
Hallen *v.* Runder, 707
Hallett *v.* Wigram, 1314
Hallett's Estate, *In re*, 66
Halliday *v.* Holgate, 636
Hamer *v.* Knowles, 411
Hamilton *v.* Merchants' Marine Insurance Co., 1008
— *v.* Spottiswoode, 811
— *v.* Terry, 700
— *v.* Vaughan-Sherrin, &c., Co., 1374, 1377
— *v.* Young, 89
— Fraser & Co. *v.* Pandorf & Co., 938
Hamlin *v.* G. N. Ry. Co., 1312
Hamlyn *v.* Crown Accidental Insurance Co., 939
— *v.* Talisker Distillery Co., 957
Hammersley *v.* Baron de Biel, 704
Hammersmith, &c., Ry. Co. *v.* Brand, 412
Hammerton *v.* Earl of Dysart, 503, 1162
Hammond *v.* Bussey, 807, 822, 1283, 1299
— *v.* Schofield, 670
Hammond's Case, 1175
Hamon *v.* Falle, 524
Hampshire *v.* Wickens, 881
Hanbury *v.* Jenkins, 1088
Hancock *v.* Gillard, 888
Hancocks *v.* Demeric-Lablanche, 1358
Handcock *v.* Baker, 8, 453, 478
Hanmer (Lord) *v.* Flight, 458, 1215, 1254
Hannaford *v.* Syms, 427, 486
Hansard *v.* Robinson, 834, 835
Hanson *v.* Waller, 484
Harbin *v.* Masterman, 1453
Harburg India Rubber Comb Co. *v.* Martin, 702, 703
Hardaker *v.* Idle District Council, 490
Harding *v.* Harding, 774
— *v.* Preece, 898
Hardwick, *In re*, 1184
Hardy *v.* Ryle, 1138
Hare and O'More's Contract, *In re*, 713, 853
Hargreave *v.* Spink, 21, 799
Hargreaves *v.* Parsons, 703
Harland and Wolff *v.* Burstall, 801
Harle *v.* Catherall, 1321
Harlock *v.* Ashberry, 1140
Harlot's Case, 270
Harman *v.* Ainslie, 900
— *v.* Johnson, 859, 1456
— *v.* Reeve, 710
Harmer *v.* Cornelius, 864
Harnett *v.* Maitland, 886
— *v.* Vise, 1320
— *v.* Yielding, 1168
Harnor *v.* Groves, 797
Harper *v.* Linthorne Dinsdale Co., 1308
— *v.* Marcks, 235
— *v.* Vigers, 850
— and G. E. Ry. Co., *In re*, 68
— & Sons *v.* Keller, Bryant & Co., 851
Harrington, *In re*, 1398
— *v.* Victoria Graving Dock Co., 559, 734
Harris *v.* Amery, 859
— *v.* Beauchamp, 1207, 1327
— *v.* Brisco, 207, 734
— *v.* Butler, 1370
— *v.* Carter, 690
— *v.* De Pinna, 570, 571, 596
— *v.* G. W. Ry. Co., 639, 687
— *v.* Hickman, 878
— *v.* Jenkins, 1216, 1218
— *v.* Mobbs, 501
— *v.* Nickerson, 687
— *v.* Perry & Co., 242, 492, 497
— *v.* Rothwell, 601
— *v.* Sleep, 1166
— *v.* Warre, 1217
— Calculating Machine Co., *In re*, 846
Harris' Case, 685
Harrison, *In re*, Harrison *v.* Harrison, 707
— *In re*, Smith *v.* Allen, 1392
— *v.* Bull and Bull, 1342
— *v.* Bush, 533
— *v.* Harrison, 733
— *v.* Jackson, 841, 859
— *v.* L. B. & S. C. Ry. Co., 647, 650
— *v.* Pearce, 1319
— *v.* Rutland (Duke of), 9, 453, 473
— *v.* Southwark and Vauxhall Water Co., 506
Harrison's Trusts, *In re*, 77
Harrold *v.* Watney, 501
Harrop *v.* Hirst, 414, 415
Harse *v.* Pearl Life Assurance Co., 920, 942
Hart *v.* Baxendale, 650
— *v.* Gumpach, 418
— *v.* Mills, 947
— *v.* Prater, 1371
Hartley *v.* Ponsonby, 690
Harvey *v.* Bridges, 451, 964
— *v.* Facey, 682
— *v.* Farnie, 219
— *v.* Walters, 575
Harwood *v.* G. N. Ry. Co., 603
Haslam and Heir-Evans, *In re*, 1452
Hatchard *v.* Mège, 541, 1394
Hatton *v.* Treeby, 253
Hawes *v.* S. E. Ry. Co., 1310
Hawke *v.* Dunn, 71
— *v.* Hulton & Co., 735, 1416
Hawkins *v.* Kemp, 840
Hawksley *v.* Outram, 855
Haycocks *v.* Mulholland, 1150
Haylock *v.* Sparke, 483
Haynes *v.* De Beck, 519

Haynes *v.* Doman, 739
Hayward *v.* Drury Lane Theatre, 432
— *v.* Mutual Reserve Association, 1008
Head *v.* Briscoe, 1360
— *v.* Tattersall, 797
Healy *v.* Thorne, 15
Heap *v.* Hartley, 579, 580
Heard *v.* Pilley, 841
Hearn *v.* L. & S. W. Ry. Co., 650
Heath *v.* Chilton, 842
— *v.* Deane, 85, 576, 585, 1102
Heath's Garage *v.* Hodges, 501
Heather *v.* Webb, 1407
Heaven *v.* Pender, 431, 485, 486
Hebditch *v.* MacIlwaine, 535
Hebdon *v.* West, 923
Heddon *v.* Evans, 418
Hedley *v.* Bainbridge, 859
Heffer *v.* Martin, 258
Heilbut, Symons & Co. *v.* Buckleton, 793
Helby *v.* Matthews, 684, 799
Hellawell *v.* Eastwood, 891
Hellwig *v.* Mitchell, 1227
Helps *v.* Clayton, 1371
Henderson *v.* Arthur, 876
— *v.* Barnewall, 853
— *v.* Henderson, 955
— *v.* Stevenson, 654, 687
— *v.* Thorn, 908, 1309
Henfree *v.* Bromley, 762
Henkel *v.* Pape, 727
Henley *v.* Mayor of Lyme Regis, 417
Henman *v.* Berliner, 884
Hennell *v.* Davies, 1229
Hennessy *v.* Keating, 620
Henthorn *v.* Fraser, 683
Hepworth *v.* Pickles, 1266
Herbert *v.* Markwell, 641
Herbert Morris *v.* Saxelby, 738
Herdman *v.* Wheeler, 817, 823
Herman *v.* Jeuchner, 730
Hermann *v.* Charlesworth, 733
Herne Bay Steam Boat Co. *v.* Hutton, 757
Hess *v.* Labouchere, 1235
Hetherington *v.* N. E. Ry. Co., 495
Hewett *v.* Barr, 1191
Hewlett *v.* Cruchley, 1318
Hewson *v.* Shelley, 1393
Hexter *v.* Pearce, 1170
Heywood *v.* Cope, 1170
Hick *v.* Raymond, 654, 655
Hickman *v.* Berens, 854, 1443
— *v.* Haynes, 759
— *v.* Upsall, 1135
Hicks *v.* Faulkner, 548, 549
Higgens's Case, 669
Higgins *v.* Beauchamp, 859
— *v.* Betts, 573, 596
— *v.* Pitt, 679
— *v.* Searle, 501
— *v.* Senior, 842
Hill *v.* Balls, 726
— *v.* East and West India Dock Co., 898
— *v.* Hart Davies, 1160
— *v.* Metropolitan Asylum District Board, 244, 488, 512
Hill *v.* Thompson, 602
Hilliard, *In re*, 1184
Hills *v.* Sughrue, 728, 756
Hilton *v.* Granville (Earl), 589
Himmelspring *v.* Singer Manufacturing Co., 965
Hinchliffe, *In re*, 1386
Hinde *v.* Liddell, 1307
Hindley *v.* Earl of Westmeath, 733, 1363
Hine *v.* Steamship Insurance Syndicate, 845
Hiort *v.* L. & N. W. Ry. Co., 468
Hippisley *v.* Knee Bros., 849
Hirst *v.* West Riding Union Banking Co., 704, 1418
Hitchcock *v.* Coker, 739
Hoadly *v.* M'Laine, 712
Hoare *v.* Rennie, 761
Hobbs *v.* L. & S. W. Ry. Co., 1297, 1312
Hobson *v.* Trevor, 772
Hoby *v.* Roebuck, 887
Hochster *v.* De La Tour, 750, 1132, 1288
Hodder *v.* Williams, 426, 894
Hodge *v.* Matlock Bath U. D. C., 1420
Hodges *v.* Horsfall, 726
Hodgkins *v.* Simpson, 737
Hodgkinson *v.* Ennor, 410, 591
Hodgson, *In re*, Beckett *v.* Ramsdale, 1142
— *v.* Gardner's Co., 580
— *v.* Scarlett, 532
— *v.* Sidney, 437
— *v.* West Stanley Colliery, 870, 1345
Hodkinson *v.* L. & N. W. Ry. Co., 658
Hodson *v.* Heuland, 705
— *v.* Pare, 532, 1382
Hoey *v.* Felton, 1303
Hoffe's Estate Act, *In re*, 776
Hogarth *v.* Jennings, 894
Hogg *v.* Ward, 480
Holden *v.* Bostock, 1287
— *v.* Thompson, 207
Holder *v.* Soulby, 642
Holding *v.* Elliott, 695
Hole, *In re*, 899
— *v.* Chard Union, 1324
— *v.* Sittingbourne Ry. Co., 490, 511
Holford *v.* Bailey, 580
Holgate *v.* Bleazard, 429, 451, 509
Holland *v.* Hodgson, 891, 903
Hollinrake *v.* Truswell, 606
Hollis *v.* Young, 237
Holme *v.* Brunskill, 899
Holmes, *In re*, 785
— *v.* Blogg, 1377
— *v.* Kidd, 824
— *v.* Mather, 445, 446, 452, 470, 471, 472, 485, 496
— *v.* Millage, 1327
— *v.* Williamson, 948
Holroyd *v.* Marshall, 772
Holt *v.* Ward Clarencieux, 1373
Holwell Iron Co. *v.* Midland Ry. Co., 1027
Homersham *v.* Wolverhampton Waterworks Co., 672
Homing Pigeon Co. *v.* Racing Pigeon Co., 529
Honck *v.* Muller, 761

Honduras Ry. Co. *v.* Lefevre and Tucker, 1148
Honour *v.* Equitable Life Society, 1163
Honywood *v.* Honywood, 885
Hood *v.* Anchor Line, 654
Hood (Lord) *v.* Kendall, 883
Hood Barrs *v.* Cathcart, 1366
— *v.* Heriot, 1366
Hookham *v.* Pottage, 617
Hoop, The, 1434
Hooper *v.* Keay & Draper, 754
— *v.* L. & N. W. Ry. Co., 430, 656
— *v.* Smart, 787
— and Ashby *v.* Willis, 740
Hooton *v.* Dalby, 1244
Hope *v.* Evered, 547
— *v.* Leng, 536
Hopkins *v.* Collier, 1264
— *v.* G. N. Ry. Co., 407
— *v.* Logan, 691
— *v.* Swansea (Mayor of), 94
Horlick's Malted Milk Co. *v.* Summerskill, 618
Horn *v.* Anglo-Australian Life Assurance Co., 927
— *v.* Baker, 904
Horncastle *v.* Equitable, &c., Co. of U. S. A., 926
Horne *v.* Midland Ry. Co., 1283
Horner *v.* Graves, 740
Hornsey L. B. *v.* Monarch, &c., Society, 69
Horsey *v.* Graham, 705
— Estate, Ltd. *v.* Steiger, 443
Horwood *v.* Millar's, &c., Co., 738
Hosier Bros. *v.* Earl of Derby, 1182, 1428
Hoskins *v.* Robins, 968
Houghton *v.* Matthews, 852
Houlden *v.* Smith, 419, 484, 531
Houlditch *v.* Marquis of Donegal, 955
Houldsworth *v.* City of Glasgow Bank, 559
Hounsell *v.* Smyth, 432
House Property Co. *v.* Horse Nail Co., 1147
Household Fire Insurance Co. *v.* Grant, 683
Howard *v.* Fanshawe, 767, 1404
— *v.* Gosset, 477
— *v.* Harris, 637
— *v.* Patent Ivory Co., 842
— *v.* Sheward, 845
— *v.* Wood, 952
Howatson *v.* Webb, 679, 720, 726
Howe *v.* Smith, 711
Howes *v.* Prudential Assurance Co., 927
Howgate's Contract, *In re*, 762
Hoye *v.* Bush, 477
Hoyle *v.* Hoyle, *In re* Hoyle, 701, 703
Hubbuck *v.* Wilkinson, 544
Huckman *v.* Fernie, 925
Hudson *v.* Boutflower, 1460
— *v.* Bray, 496
— *v.* Fernyhough, 774
— *v.* Midland Ry. Co., 656
— *v.* Tabor, 410
— *v.* Temple, 749
Huffam *v.* N. Staffs. Ry. Co., 100, 122
Huggett *v.* Miers, 487
Hugh Pine's Case, 148
Hughes, *In re*, 858
— *v.* Coed Talon Colliery Co., 1344
— *v.* Liverpool, &c., Soc., 924
— *v.* Pump House Hotel Co., 775, 776, 779, 781, 788, 1214
Hugill *v.* Masker, 800
Hulbert *v.* Dale, 569, 585
Hulthen *v.* Stewart & Co., 654
Hulton *v.* Hulton, 1358
Humble *v.* Hunter, 842
— *v.* Mitchell, 767
Hume *v.* Druyff, 1191
Humfrey *v.* Dale, 86, 88
Humphreys *v.* Green, 704
— *v.* Miller, 882
Humphries *v.* Brogden, 410, 588, 590
— *v.* Cousins, 410
— *v.* Humphries, 877
Hunt, *In re*, 1386
— *v.* Algar, 1322
— *v.* G. N. Ry. Co., 535, 538
— *v.* Peake, 588
— *v.* Star Newspaper Co., 529
— *v.* Wimbledon Local Board, 1421, 1446
— Roope, Teage & Co. *v.* Ehrmann, 620
Hunter *v.* Hunt, 948
Huntsman, The, 845
Hurdman *v.* N. E. Ry. Co., 508
Hurlbatt *v.* Barnett & Co., 1008
Hurrell *v.* Ellis, 459
Hurst *v.* Holding, 847
— *v.* Picture Theatres, Ltd., 875
— *v.* Taylor, 501
Hussey *v.* Horne-Payne, 682, 683, 697
Hutchins *v.* Chambers, 890
— *v.* Scott, 894
Hutchinson *v.* Tatham, 86, 88
Huth *v.* Huth, 518
Hutt *v.* Morrell, 892
Huttley *v.* Simmons, 263, 631, 632
Hutton *v.* Warren, 883, 886, 902
Huxley *v.* West London Extension Ry. Co., 1335
Hyams *v.* Stuart King, 735, 737
Hyde *v.* Warden, 1165
Hydraulic, &c., Co. *v.* McHaffie, 1283, 1295, 1311
Hymas *v.* Ogden, 462, 1155

I.

IBBERSON *v.* Neck, 778
Imperial Gas Light Co. *v.* London Gas Light Co., 1142
— Japanese Govt. *v.* P. & O. Navigation Co., 663, 1432
— Loan Co. *v.* Stone, 1387
Imray *v.* Oakshette, 1266
In re Accrington, &c., Tramways Co., 1093
— African Association, Ltd., 863
— Ainslie, 706, 707
— Allen, *Ex parte* Shaw, 1400
— Alston, 1109
— Anderton, 881

In re Anglesey, Marquis of, 1152, 1327
— Application under the Solicitors Act, An, 1445
Asphaltic Wood Pavement Co., 788
Barber, 1381
— Beaumont, 829
Beck, 1147
Belham, 961
— Bell, 778
— Bellencontre, 1457
— Benn-Davis, 892
Berna Motors, 612
— Bethell, 828
— Blanche, 1229
Blyth and Fanshawe, 1452
— Bolivia Exploration Syndicate, 1432
— Bowden, Andrew *v.* Cooper, 1392
— Bremer's Patent, 600
— Briggs & Co., 858, 859
Bristol Ry., 1176
Bristow, 787
Broad, 1452
— Browne, *Ex parte* Martingell, 737
— Bruce, 1109
Bumpus, *Ex parte* White, 1401
— Burdett, *Ex parte* Byrne, 729
— Burnett, 1403
Burroughs, Wellcome & Co.'s Trade Marks, 612
— Cadbury's Application, 612
— Carl Lindstroem's Trade Mark, 612
Cartwright, Avis *v.* Newman, 886
Cathcart, 1381
— Chaffers, 1446
— Champion, C. G., 1460
— Cohen, 898
— Coolgardie Goldfields, Ltd., 1454
— Cooper, 390
— Cromuire, *Ex parte* Waud, 738
Dagnall, 1400
— Dangar's Trusts, 1454
— Daniel, 1313
— Davies, 1454, 1459
— Debtor, A, 718, 1399, 1448
— Denton's Estate, 702
— D'Epineuil, 777
— Derbyshire, 828
— Dixon, 1152
Douglas, 1175
— Dudley, 1184
Duncan, Terry *v.* Sweeting, 437, 1395
— Dunkley & Son, 781
— E. G., 1389
— Eager, Eager *v.* Johnstone, 1001
— Eastgate, *Ex parte* Ward, 1405
— Eastman Co.'s Trade Mark, 612
— Eede, 1459
English and Colonial Produce Co., 665, 1422
— — Bank of the River Plate, 1306
— Enoch and Zaretzky, Bock & Co., 1086, 1274
— Ethel, 19
In re Etherington and Lancs., &c., Insurance Co., 939
— Evans, 1330
— Famatina, &c. Corp., 848
— Farman, 1456
— Farnham, 1400
— Fickus, Farina *v.* Fickus, 704
— Ford, 1208
— Freston, 202, 1184
— Frieze-Green's Patent, 599
— Garnett, 1100
— Gaskell and Walters, 1431
— General Railway Syndicate, 720
— Gentry, 1402
— George, Francis *v.* Bruce, 836
— — and Goldsmiths, &c., Association, 945
— Gieve, 737
— Glasdir Copper Works, Ltd., 903
— Gloucester Municipal Election Petition, 844
— Gomersall, 816
— Gurney, 1208
— Hale, Lilley *v.* Foad, 845
— Hall, 745, 927
— Hallett's Estate, 66
— Hardwick, 1184
— Hare and O'More's Contract, 713, 853
Harper and G. E. Ry. Co., 68
— Harrington, 1398
— Harris Calculating Machine Co., 846
— — , Harrison *v.* Harrison, 707
— Harrison, Smith *v.* Allen, 1392
— Harrison's Trusts, 77
Haslam and Hier-Evans, 1452
— Hilliard, 1184
— Hinchliffe, 1386
— Hodgson, Beckett *v.* Ramsdale, 1142
— Hoffe's Estate Act, 776
— Hole, 899
— Holmes, 785
— Howgate's Contract, 762
— Hoyle, Hoyle *v.* Hoyle, 701, 703
— Hughes, 858
— Hunt, 1386
— Irving, 777
— Isaac, Jacob *v.* Isaac, 1357
— J., 1386
— Johannesburg Hotel Co., 1421
— Johnson, 1397
— Johnson's Patent, 599
— Jolly, 907
— Jones, 1371
— Farrington *v.* Forrester, 1376
— Joseph Crosfield & Sons, Ltd., 612
— — Hargreaves, 1102
— Jude's Musical Compositions, 780
— Keet, 1403
— Keller, 1175
Kelly, 1457
— Kerly, 1454
— Kingston Cotton Mill Co., 560
— Lancaster, 905
— Lancs. and Yorks. Bank's Lease, 901
— Le Brasseur and Oakley, 1441

In re Leeds and Hanley Theatre of Varieties, 1302
— London and General Bank, 560
— — Globe Corporation, 853
— — Northern Bank, 683
— — — Hoyle's Case, 1098
— Londonderry Equitable Co-operative Society, 1415
— Longdendale Cotton Spinning Co., 1023
— Maidstone Palace of Varieties, Ltd., 1166
— Marquis of Anglesey, 1152, 1327
— Mason's Orphanage and L. & N. W. Ry. Co., 880
— Milan Tramways, 787, 788
— Morris, 854
— Moss Bay Hematite Co., 788
— Nathan, 1177
— National Motor Mail Coach Co., 1422
— Neal, 1404
— New Hamburg Ry. Co., 773
— Newen, 1448
— One & All, &c., Association, 1411, 1422
— Onslow's Trusts, 1373
— O'Shea, 736
— Otto Electrical Manufacturing Co., 1422
— Oxlade and N. E. Ry. Co., 652
— Padstow Total Loss Association, 1411
— Page, 898
— Patrick, 784
— Pawson, 1406
— Payne & Co., 844
— Pilling, *Ex parte* Salaman, 1405
— Platt, 1381
— Plummer, 1450
— Pollard, 1015
— Potts, *Ex parte* Taylor, 1165
— Powell's Trade Mark, 611
— Pryse, 1258
— Radcliffe, Radcliffe *v.* Bewes, 899
— Rapid Road Transit Co., Ltd., 854
— Republic of Bolivia, &c., 663
— Rhodes, 950, 1387
— River Steamer Co., 1140
— Roney & Co., 1452
— Rose, 855
— Roundwood Colliery Co., 893
— St. Nazaire Co., 1163
— Sandow, Ltd.'s Application, 614
— Sharpe's Trade Mark, 612
— Shaw, 1406
— Shephard, 1326
— Sherry, 754
— Sheward, 776
— Smith and Belfast Corporation, 1295
— — Hartogg, 888
— Solicitor, A, [1895] 2 Ch. 66...1454
— — [1902] 1 K. B. 128...1445
— — [1903] 2 K. B. 205...1459
In re Solicitor, A (1905), 93 L. T. 838...1457
— — [1907] 2 K. B. 539...1454
— Soltykoff, 837, 1374, 1400
— Somerset (Duke of), 1353
— South American, &c., Co., *Ex parte* Bank of England, 669
— — Wales Atlantic S.S. Co., 1411
— Suarez, 1432
— Summerson, 1266
— Sutton's Trusts, 773
— Sweeting, 1445
— Taylor, 29
— Thomas Crook's Trade Mark, 614
— Thompson, 1184
— Tiedemann and Ledermann Frères, 842, 844
— Tobias, 1011
— Toleman, 1393
— Trade Mark "Bovril," 612
— Turcan, 780
— Turner, 1093
— "Uneeda" Trade Mark, 612
— Verrall, 73
— Wagstaff, 1332
— Walker, 1388
— Wallis and Barnard's Contract, 1164, 1195
— Walmsley, 1406
— Wasdale, 785
— Weare, 1457
— West Devon Great Consols Mine, 854
— Whitehead, 1446
— Wilde, 1456
— Williams, 927
— Williams and Lancs., &c., Insurance Co., 942, 945
— Wimbledon Olympia, 1413
— Wrexham, &c., Ry. Co., 846
— York (Dean of), 1179
— Young, *Ex parte* Jones, 857
Inchbald *v.* Western Neilgherry Coffee Co., 848
Ind, Coope & Co. *v.* Emmerson, 982, 1267
Indermaur *v.* Dames, 433
Ingram *v.* Lawson, 1322
Inman *v.* Stamp, 705
International Fibre Syndicate *v.* Dawson, 777, 780
Ionides *v.* Pender, 724
Ireland *v.* Champneys, 1398
— *v.* Livingston, 844
Irving, *In re*, 777
— *v.* Veitch, 948
Isaac, *In re*, Jacob *v.* Isaac, 1357
Isaac's Case, 398
Isaacs *v.* Hobhouse, 1334
— & Sons *v.* Salbstein, 666, 670
Isaacson *v.* Durant, 1428
Isitt *v.* Ry. Pass. Assurance Co., 295, 941, 943
Islington Vestry *v.* Hornsey U. D. C., 1163
Ivay *v.* Hedges, 487
Iveson *v.* Moore, 575

J.

J., *In re*, 1386
J. Lyons & Sons *v.* Wilkins, 506, 632
Jackson *v.* Normanby Brick Co., 1157
— *v.* Rogers, 643
— *v.* Watson & Son, 561, 1294
Jacob *v.* Down, 885
— *v.* Isaac, *In re* Isaac, 1357
Jacobs *v.* Booth's Distillery Co., 1207
— *v.* Fisher, 948
— *v.* Morris, 823
Jacques *v.* Harrison, 1263
Jaeger's Sanitary Woollen Co. *v.* Walker, 780
Jakeman *v.* Cook, 693
James, *Ex parte*, 1012
— *v.* James, 616
— *v.* Kerr, 782
v. Smith, 1171
— *v.* Tutney, 85, 96
— Jones & Sons, Ltd. *v.* Tankerville, 1171
— Morrison & Co., Ltd. *v.* Shaw, 915
Janson *v.* Brown, 962
— *v.* Driefontein Mines, 1415, 1434
Janvier *v.* Sweeney, 491, 545
Jarrett *v.* Hunter, 698
Jassy, The, 1432
Jay *v.* Budd, 1002
— *v.* Johnstone, 1136
Jay's Furnishing Co. *v.* Brand, 892
Jeakes *v.* White, 706
Jefferys *v.* Boosey, 413
Jeffrey *v.* St. Pancras Vestry, 501
Jeffries *v.* G. W. Ry. Co., 467
Jegon *v.* Vivian, 1288
Jenkins *v.* Bushby, 1016
— *v.* Harvey, 78
— *v.* Jackson, 506
— *v.* Morris, 1380
— *v.* Tucker, 1364
— & Sons *v.* Coomber, 815
Jenks *v.* Clifden, 1395
Jenkyns *v.* Southampton, &c., Packet Co., 656
Jenner *v.* Turner, 733
Jennings *v.* Hammond, 1411
— *v.* Johnson, 734
— *v.* Rundall, 1370
Jenoure *v.* Delmege, 535
Jervis *v.* Berridge, 697
Jewson *v.* Gatti, 487
Joel *v.* Law Union, &c., Insurance Co., 724, 925
— *v.* Morrison, 491
Johannesburg Hotel Co., *In re*, 1421
John *v.* John, 1165, 1257
— White & Sons *v.* White, 591, 594
— Young & Co. *v.* Bankier Distillery Co., 591
Johnson, *In re*, 1397
— *v.* Barnes, 449, 569, 570, 578
— *v.* Diprose, 459
— *v.* Dodgson, 712
v. Emerson, 552
v. Hudson, 732
Johnson *v.* Kearley, 848
— *v.* Lindsay, 867
— *v.* R., 1153
— *v.* Wild, 948
Johnson's Patent, *In re*, 599
Johnston *v.* G. W. Ry. Co., 1289, 1303, 1334
— *v.* Orr Ewing & Co., 412, 621
Johnstone *v.* Cox, 785
— *v.* Hudlestone, 908
— *v.* Mappin, 704
— *v.* Marks, 1372
— *v.* Milling, 807
— *v.* Shrewsbury Ry. Co., 1170
— *v.* Sutton, 418, 550
Joint Committee of River Ribble *v.* Croston U. D. C., 669
Jolly, *In re*, 907
— *v.* Kine, 571
— *v.* Rees, 1361
Jonassohn *v.* Young, 761
Jones, *Ex parte*, *In re* Jones, 1400
— *In re*, 1371
— *In re*, Farrington *v.* Forrester, 1376
— *v.* Biernstein, 894
— *v.* Bowden, 795
— *v.* Broadhurst, 438
— *v.* Carter, 767
— *v.* Chapman, 448
— *v.* Chappell, 885
— *v.* Coventry, 782
— *v.* Curling, 1280
— *v.* Festiniog Ry. Co., 488
— *v.* Gooday, 1304
— *v.* Gordon, 816, 832
— *v.* Great Central Ry. Co., 1099
— *v.* Hough, 1315
— *v.* Hulton & Co., 520
— *v.* Humphreys, 776, 781
— *v.* Jones, 524
— *v.* Joseph, 884
— *v.* Just, 795
— *v.* Lavington, 881
— *v.* Llanrwst U. D. C., 245
— *v.* Marsh, 901
— *v.* Merionethshire Building Society, 717, 733
— *v.* Mills, 900, 901
— *v.* Morris, 882
— *v.* Phipps, 901
— *v.* Ryde, 833
— *v.* Scottish Accident Insurance Co., 1002
— *v.* Scullard, 493
— *v.* Spencer, 1332
— *v.* Starkey, 777
— *v.* Stone, 1264
— *v.* Victoria Graving Dock Co., 700
— *v.* Williams, 518, 966
— James, & Sons *v.* Earl Tankerville, 1171
Jose *v.* Metallic Roofing Co., 629
Joseph *v.* Lyons, 772
— Crosfield & Sons, Ltd., *In re*, 612
— Hargreaves, *In re*, 1102
Joseph Rand, Ltd. *v.* Craig, 451, 492, 722
Josolyne *v.* Roberts, 831
Jourdain *v.* Wilson, 770

Joyner *v.* Weeks, 908, 1009, 1309
Joynt *v.* Cycle Trade Publishing Co., 530
Jude's Musical Compositions, *In re*, 780
Julius *v.* Lord Bishop of Oxford, 1177

K.

KARNO *v.* Spratt, 1331
Kaufman *v.* Gerson, 717, 956
Kaye *v.* Dutton, 690
Kearney *v.* Lloyd, 626, 631
Kearon *v.* Pearson, 756
Keat *v.* Allen, 733
Keech *v.* Hall, 880
Keen *v.* Price, 856
— *v.* Priest, 893
Keepers of the Liberties of England, The *v.* Howell Gwinn, 200
Keet, *In re*, 1403
Keighley, Maxsted & Co. *v.* Durant, 842
Keir *v.* Leeman, 210
Keller, *In re*, 1175
Kelly, *In re*, 1457
— *v.* Lawrence, 477
— *v.* Metropolitan Ry. Co., 430
— *v.* Morris, 606
— *v.* O'Malley, 537
— *v.* Patterson, 878
— *v.* Rogers, 882
— *v.* Selwyn, 784, 785
— *v.* Sherlock, 1320, 1334
— *v.* Solari, 727, 951
— *v.* Tinling, 528
— *v.* Webster, 706
Kelner *v.* Baxter, 688, 842, 851, 1421
Kemble *v.* Farren, 1316
Kemp *v.* Baerselman, 765, 780
— *v.* Christmas, 1284
— *v.* Falk, 806
— *v.* Lester, 1264
— *v.* Lewis, 871
— *v.* Neville, 420
Kempshall *v.* Holland, 854, 1275, 1443, 1448
Kendall *v.* L. & S. W. Ry. Co., 645
Kennedy *v.* Broun, 948, 1441
— *v.* Panama, &c., Mail Co., 726
— *v.* Thomas, 824
Kent *v.* Courage, 1418
— *v.* Midland Ry. Co., 658
— *v.* Shuckard, 641
— *v.* Ward, 1445
— C. C. *v.* Folkstone Corporation, 503
— — *v.* Vidler, 502
Kenworthy *v.* Schofield, 713
Kerly, *In re*, 1454
Kershaw *v.* Sievier, 737
Kettlewell *v.* Refuge Assurance Co., 924
Keymer *v.* Reddy, 1191
Kibble, *Ex parte*, *In re* Onslow, 1376
Kidderminster (Mayor of) *v.* Hardwick, 673, 1419
Kiddill *v.* Farnell, 855
Kidston *v.* Monceau Ironworks, 793
Kilgour *v.* Gaddes, 574
Kilmore *v.* Abdoolah, 1334
Kimber *v.* Gas Light and Coke Co., 432, 487, 493
Kimber *v.* The Press Association, 535
Kinahan *v.* Bolton, 619
King *v.* Allen & Sons, 578
— *v.* Alston, 952
— *v.* Hoare, 670
— *v.* Jones, 1140
— *v.* London Cab Co., 492, 493
— *v.* Shepherd, 1182
— *v.* Smith, 679, 1449
— *v.* Victoria Insurance Co., Ltd., 779, 930
— *v.* Zimmerman, 834
King of the Two Sicilies *v.* Wilcox, 1416
Kingham *v.* Robins, 1229
Kingston Cotton Mill Co., *In re*, 560
Kingston's (Duchess of) Case, 669, 958
Kirby *v.* Simpson, 483
Kirk *v.* Gregory, 459
Kirkham *v.* Attenborough, 797
— *v.* Marter, 703
Kirkwood *v.* Carroll, 830
— *v.* Smith, 830
Kistler *v.* Tettmar, 1329
Kitchen *v.* Campbell, 1324
Kitchenham *v.* Owners of S.S. "Johannesburg," 1107
Kleinwort, Sons & Co. *v.* Comptoir National, 469
Knight *v.* Simmonds, 1137
— *v.* Williams, 899
Knill *v.* Prowse, 781
Knowlman *v.* Bluett, 709, 748
Knox *v.* Bushell, 1362
Kreglinger, G. and C. *v.* New Patagonia Co., 68
Krell *v.* Henry, 757
Kruse *v.* Johnson, 95
Kutner *v.* Phillips, 1036

L.

"LA BOURGOGNE," 1002
Ladbroke & Co. *v.* Todd, 828
Ladd's Case, 281
Lagos *v.* Grunwaldt, 1203, 1206
Lagunas Nitrate Co. *v.* Lagunas Syndicate, 725
Laing *v.* Barclay, 797
— *v.* Whaley, 591
Laird *v.* Birkenhead Ry. Co., 673
— *v.* Briggs, 71
— *v.* Dobell, 119, 374
Lamb *v.* Brewster, 75
— *v.* Walker, 1281
Lambert *v.* Norris, 887
— *v.* Thornton, 96
Lambkin *v.* S. E. Ry. Co., 1278
Lambourn *v.* McLellan, 903
Lamine *v.* Dorrell, 952
Lampet's Case, 768
Lampleigh *v.* Brathwait, 691
Lamson Pneumatic Tube Co. *v.* Phillips, 740
Lancs. and Yorks. Bank's Lease, *In re*, 901
Lancs. and Yorks. Ry. Co. *v.* Gidlow, 1295
— — *v.* MacNicoll, 465
Lancashire Insurance Co. *v.* Commissioners of Inland Revenue, 943

Lancashire Waggon Co. *v.* Fitzhugh, 460
Lancaster, *In re*, 905
Lanchbury *v.* Bode, 77
Lane *v.* Capsey, 967
Lane Fox *v.* Kensington Lighting Co., 600
Langham *v.* Thompson, 1109
Langridge *v.* Levy, 431
— *v.* Lynch, 1454
Langrish *v.* Watts, 1141
Langton *v.* Roberts, 1208
Lansbury *v.* Riley, 185
Lascelles *v.* Lord Onslow, 967
Latch *v.* Latch, 1392
Latham *v.* Johnson, 428, 501
Latimer *v.* Official Co-operative Society, 590
Latuch *v.* Pasherante, 1449
Laugher *v.* Pointer, 491
Laughton *v.* Bishop of Sodor & Man, 535
Lauri *v.* Renad, 1256
Laurie *v.* West Hartlepool T. I. A. and David, 781
Lavery *v.* Pursell, 705, 707
Lavy *v.* L. C. C., 68
Law *v.* Law, 669
— *v.* Llewellyn, 420, 482, 532
— *v.* Local Board of Redditch, 1317
Law & Bonar, Ltd. *v.* British, &c., Tobacco Co., 801
Lawford *v.* Billericay R. D. C., 672, 673, 748, 1420
Lawrance *v.* Lord Norreys, 1142
Lawrence *v.* Accident Insurance Co., 941
— *v.* Jenkins, 416
— & Bullen, Ltd. *v.* Aflalo, 607
Lax *v.* Corporation of Darlington, 498
Lay *v.* Mottram, 674
Laybourn *v.* Crisp, 80
Laythoarp *v.* Bryant, 699
Lea *v.* Charrington, 547
— *v.* Hinton, 923
— *v.* Whitaker, 1316
Lea Bridge, &c., Gas Co. *v.* Malvern, 1361
Leach *v.* R., 999, 1038
— *v.* Thomas, 886
Lead Co. *v.* Richardson, 73
Leadbitter *v.* Farrow, 823
Leame *v.* Bray, 470, 472
Learoyd *v.* Bracken, 732
— *v.* Brook, 865
Leary *v.* Patrick, 483
Leathem *v.* Craig, 545, 628
Leather Cloth Co. *v.* American Leather Cloth Co., 597, 619
— *v.* Hieronimus, 713
— *v.* Hirschfield, 614
— *v.* Lorsont, 741
Le Blanche *v.* L. & N. W. Ry. Co., 655, 1297, 1307, 1312
Le Brasseur and Oakley, *In re*, 1441
Le Conteur *v.* L. & S. W. Ry. Co,, 649
Leduc *v.* Ward, 912, 913
Lee *v.* Arthur, 1220
— *v.* Cooke, 465, 890
— *v.* Gaskell, 708
— *v.* Jones, 946
— *v.* Lancs. and Yorks. Ry. Co., 752
— *v.* Magrath, 774
Lee *v.* Riley, 460
— *v.* Risdon, 707
Leeds and County Bank *v.* Walker, 763, 836
— Hanley Theatre of Varieties, *In re*, 1302
Le Fanu *v.* Malcolmson, 520
Legh *v.* Hewitt, 76, 82
— *v.* Lillie, 888
Leigh *v.* Dickeson, 948
Leith *v.* Pope, 550, 1318
Le Lièvre *v.* Gould, 428, 486, 554, 721
Lemaitre *v.* Davis, 590
Lemere *v.* Elliott, 948
Le Mesurier *v.* Le Mesurier, 219, 1019
Lemmon *v.* Webb, 508, 512, 966, 967
Le Neve *v.* Vestry of Mile End, 461
Leng & Co. *v.* Andrews, 1374
Lepla *v.* Rogers, 1296, 1318
Leroux *v.* Brown, 700
Leslie *v.* Young & Sons, 606
— *v.* Shiell, 1374
Lett *v.* Morris, 777
Levene *v.* Brougham, 1373
Lever *v.* Associated Newspapers, 530, 1247
— *v.* Goodwin, 614
— *v.* Koffler, 699
Levet *v.* Gas Light and Coke Co., 572
Levi *v.* Levi, 258
Levy *v.* Pyne, 859
— *v.* Stogden, 1172
— *v.* Warburton, 848
Lewis, *Ex parte*, 15
— *v.* Baker, 889
— *v.* Clay, 678, 726, 817
— *v.* Clifton, 1305
— *v.* Davies, 889
— *v.* Davison, 730
— *v.* G. W. Ry. Co., 648
— *v.* Green, 1194
— *v.* Levy, 536
— *v.* Vine, 614
— *v.* Walter, 69
— and Lewis *v.* Durnford, 1220
Lickbarrow *v.* Mason, 720, 804, 839, 914
Liddy *v.* Kennedy, 901
Liebenrood *v.* Vines, 883
Liebig Extract Co. *v.* Hanbury, 617
Life and Health Assurance Association *v.* Yule, 926
Liles *v.* Terry, 1451
Lilley *v.* Doubleday, 639
— *v.* Elwin, 862, 864
— *v.* Foad, *In re* Hale, 845
— *v.* Roney, 532, 1458
Limpus *v.* General Omnibus Co., 491, 1417
Lindenau *v.* Desborough, 928
Lindsay *v.* Gibbs, 772
— Petroleum Co. *v.* Hurd, 1137
Linford *v.* Fitzroy, 482
Linotype Co., Ltd. *v.* British Empire, &c., Co., 541
Lionel Barber & Co. *v.* Deutsche Bank, 1334
Liquidation Estates Purchase Co. *v.* Willoughby, 784, 787
Lister *v* Lancs. and Yorks. Ry. Co., 645
— *v.* Lane, 884
— *v.* Perryman, 548, 549

Lister *v.* Stubbs, 734
Lister's Case, 244
Little *v.* Slackford, 811
— *v.* Spreadbury, 1442, 1448
Little Hulton U. D. C. *v.* Jackson, 503
Liver Alkali Co. *v.* Johnson, 916
Liverpool Corp. *v.* Coghill, 591
— Household Stores *v.* Smith, 1160
Livesey *v.* Harding, 785
Llandudno U. D. C. *v.* Woods, 15, 446, 1162, 1163
Lloyd *v.* Grace, Smith & Co., 722
— *v.* Great Western Dairies Co., 1260
— *v.* Nowell, 683
Lloyd's Bank *v.* Cooke, 817, 1110
Lock *v.* Ashton, 476
Lockwood *v.* Wood, 577
Lodge *v.* National Union Investment Co., 731
— Holes Colliery Co. *v.* Wednesbury Corporation, 1304, 1307
Logan *v.* Bank of Scotland (No. 2), 206, 1199
London and County Bank *v.* Bray, 1353
— — *v.* London and River Plate Bank, 769, 838, 839
— General Bank, *In re*, 560
— Globe Corporation, *In re*, 853
— Midland Bank *v.* Mitchell, 1136
— N. W. Ry. Co. *v.* Fobbing Level Commissioners, 25, 584
— — *v.* Hinchcliffe, 655
— Northern Bank, *In re*, 683
— — *In re*, Hoyle's Case, 1098
— S. A. Exploration Co. *v.* De Beers Co., 903
— Yorks. Bank *v.* Belton, 893
— — *v.* White, 782
— Association of Shipowners *v.* London, &c., Docks Committee, 94, 458, 1163
— Assurance Co. *v.* Mansel, 724, 925, 942
L. B. & S. C. Ry. Co. *v.* Truman, 244, 412, 512, 513
London Chartered Bank of Australia *v.* White, 87
L. C. & D. Ry. Co. *v.* S. E. Ry. Co., 1152, 1153
L. C. C. *v.* Att.-Gen., 1419
— *v.* Hobbis, 840
London Freehold, &c., Co. *v.* Suffield, 671
— General Omnibus Co. *v.* Lavell, 426, 621
— Joint Stock Bank *v.* Macmillan, 828, 1111
— (Mayor, &c., of) *v.* Cox, 1179
Londonderry Equitable Co-operative Society, *In re*, 1415
Long *v.* Clarke, 894
Longbottom *v.* Longbottom, 1028
Longbourne *v.* Fisher, 1263
Longdendale Cotton Spinning Co., *In re*, 1023
Longmeid *v.* Holliday, 430, 431
Lord *v.* Price, 467
Lotan *v.* Cross, 459
Loughborough Highway Board *v.* Curzon, 250
Louth U. D. C. *v.* West, 249
Love *v.* Bell, 410, 589
Loveden *v.* Loveden, 1112
Lovegrove *v.* White, 413
Lovell and Christmas *v.* Beauchamp, 1400
Lovering, *Ex parte*, *In re* Jones, 898
Low *v.* Bouverie, 721
Lowe *v.* Fox, 680, 762
— *v.* L. & N. W. Ry. Co., 907
Lowery *v.* Walker, 428, 509
Lows *v.* Telford, 170, 448, 451, 1256
Luby *v.* Lord Wodehouse, 1427
Lucas *v.* Dixon, 712, 1130
— *v.* Harris, 1329
— *v.* Tarleton, 415, 465
Lucena *v.* Craufurd, 929
Luckett *v.* Wood, 1276
Luckumsey Rowji *v.* Hurbun Nursey, 176
Lucy *v.* Bawden, 487
Ludlow (Mayor of) *v.* Charlton, 662, 672, 862, 1419, 1420
Lumley *v.* Gye, 262, 562
— *v.* Wagner, 1170
Luttrel's Case, 572
Lyell *v.* Kennedy, 843, 844, 1268
Lyles *v.* Southend-on-Sea Corporation, 1139
Lynch *v.* Knight, 406, 1293
Lyne, *Ex parte*, 478
— *v.* Nicholls, 540, 544
Lynn Regis (Mayor of) *v.* Taylor, 580
Lyon *v.* Fishmongers' Co., 409, 591
— *v.* Reed, 899
Lyons *v.* Elliott, 891, 892
— & Sons *v.* Wilkins, 506, 632
Lyth *v.* Ault and Wood, 689, 690
Lytton (Earl of) *v.* Devey, 606

M.

M. *v.* M., 1398
Mabe *v.* Connor, 604, 605
Macalpine & Co. *v.* Calder & Co., 1008
Macartney *v.* Garbutt, 1432
— *v.* Macartney, 1208
Macaulay *v.* Polley, 854, 1448
Macbeth *v.* N. and S. Wales Bank, 469, 814
— & Co. *v.* Maritime Insurance Co., 936, 1153, 1289
— — *v.* Chislett, 869
McCarthy *v.* Metropolitan Board of Works, 412
McCartney *v.* Londonderry, &c., Ry. Co., 591
McCaul *v.* Strauss & Co., 715
McClure, *v.* Little, 884
McConnel *v.* Wright, 725, 1302
MacConnell *v.* Prill & Co., 69
McCusker *v.* Smith, 632

McDermott v. Judges of British Guiana, 203
McDonald v. "Banana" Steamship, 1107
Macdonald v. Whitfield, 822, 828
Macdonald's (Aeneas) Case, 1428
Macdonnell v. Marston, 1314
MacDougall v. Knight, 536, 1324
Mace v. Philcox, 95
McEacharn v. Colton, 770, 1157, 1159
McEntire v. Crossley Bros., 800
McFadden v. Blue Star Line, 912
McGowan v. Smith, 777
McGregor v. McGregor, 708, 861
McGruther v. Pitcher, 794
Machado v. Fontes, 1001, 1433
McIlquham v. Taylor, 1306
Macintosh v. Dun, 534
McIntyre Bros. v. McGavin, 575
MacIver v. Burns, 1002
Mackay v. Ford, 1448
M'Kechnie's Trustees v. Scottish Accident Assurance Co., 941
M'Kenzie v. British Linen Co., 843
— v. Hancock, 1309
Macleay v. Tait, 557, 1413
Maclenan v. Segar, 641
M'Leod v. Artola, 848
Macleod v. Att.-Gen. for N. S. W., 137
McLeod v. St. Aubyn, 155, 201, 204
McMahon v. Field, 1296
McManus v. Cooke, 567, 704
Macmillan & Co. v. Dent, 606
M'Naghten's Case, 1383, 1384
M'Namara v. Brown, 491
M'Neill v. Richards, 1311
Maconchy v. Trower, 682
Maconochie v. Maconochie, 1360
M'Pherson v. Daniels, 69
McPherson v. Watt, 1452
M'Queen v. G. W. Ry. Co., 650
McQuire v. Western Morning News Co., 408, 521, 529, 530
Macrow v. G. W. Ry. Co., 656
Maddison v. Alderson, 704, 862
Madras Ry. Co. v. Zemindar of Carvatenagarum, 508
Magee v. Lavell, 1315, 1316
Magor v. Chadwick, 589
Maidstone Palace of Varieties, Ltd., *In re*, 1166
Maillard v. Page, 696
Mainwaring v. Leslie, 1362
Mair v. Ry. Pass. Assurance Co., 940
Makin v. Att-Gen. for N. S. W., 1088
Malcolm v. Hoyle, 851
— v. Scott, 777
Malcolmson v. O'Dea, 1102
Mallalieu v. Hodgson, 679
Mallan v. May, 740
Mallet v. Bateman, 701
Malone v. Cayzer, 1297
Malzy v. Eicholz, 882
Manby v. Scott, 1360, 1363
Manchester Brewery Co. v. Coombs, 765, 877, 896
— Corporation v. New Moss Colliery, 589
Manchester (Mayor, &c., of) v. Williams, 1417
— Sheffield, &c., Ry. Co. v. Brown, 647, 648
— — &c., Ry. Co. v. Denaby Main Colliery Co., 436
Mangena v. Wright, 529, 1320
Mann, Crossman & Paulin v. Land Registry, 876
Mansell v. Valley Printing Co., 468
— v. Webb, 504, 509
Mantle v. Jordan, 97
Manubens v. Leon, 863
Mara v. Browne, 859, 1456
Marais v. General Officer Commanding, 418, 1427
Marchant v. Morton, Down & Co., 777, 858
Markey v. Tolworth, &c., Hospital D. B., 74, 1139
Markwick v. Hardingham, 840
Marlor v. Bull, 509
Marriot v. Hampton, 952
Marriott v. Yeoward Bros., 646, 650
Marsh v. Billings, 425
— v. Jelf, 853
— v. Joseph, 843, 1456
Marshall v. Berridge, 727
— v. Broadhurst, 1396
— v. Glamorgan Iron Co., 1419
— v. Green, 707
— v. Orient Steam Navigation Co., 872
— v. Owners of Steamship "Wild Rose," 1107
— v. Ulleswater Steam Navigation Co., 26
— v. York, &c., Ry. Co., 430, 657
Marten v. Whale, 800
Martin, *Ex parte*, 1341
— v. Bannister, 1341
— v. Boure, 810
— v. G. N. Ry. Co., 1333
— v. Mackonochie, 1179
— v. Martin, 1220
— v. Porter, 1286
— v. Reid, 639
— v. Smith, 885
— v. Strachan, 441, 1269
— v. Treacher, 953
Martindale v. Smith, 796
Marys's Case, 561, 587
Marzetti v. Williams, 412, 413, 425, 828, 1290
Mason v. Barker, 476, 1296
— v. Provident, &c., Supply Co., 738
Mason's Orphanage and L. & N. W. Ry. Co., *In re*, 880
Masper v. Brown, 325
Massam v. Thorley's Cattle Food Co., 616
Massey v. Johnson, 705
Master v. Miller, 835, 836
— Pilots, &c., of Newcastle-upon-Tyne v. Bradley, 78
Masters v. Green, 893
Mathews v. Biddulph, 480
Matson v. Baird, 436
Matthews v. Baxter, 1389
— v. Gray, 315

Matthews *v.* Munster, 1443, 1448
— *v.* Usher, 1257
Matthias *v.* Mesnard, 891
Mavor *v.* Pyne, 747, 748
Maxim-Nordenfelt Gun Co. *v.* Nordenfelt, 738, 739, 740, 1154
Maxwell *v.* British Thomson Houston Co., 1300
May *v.* Burdett, 509
— *v.* Lane, 779
— *v.* May, 617
— *v.* O'Neill, 740
Mayfield *v.* Wadsley, 753
Mead *v.* Davison, 933
Mears *v.* Callendar, 904
— *v.* Griffin, 1334
Meath *v.* Winchester, 1102
Mecca, The, 753, 754
Medawar *v.* Grand Hotel Co., 642
Mediana, The, 1302
Mee *v.* Cruikshank, 476
Meek *v.* Port of London Authority, 864
— *v.* Wendt, 1300
Meggeson *v.* Groves, 883, 901
Melbourne Banking Corporation *v.* Brougham, 672
Melles & Co. *v.* Holme, 884
Melliss *v.* Shirley Local Board, 673, 732
Mellon *v.* Henderson, 882
Mellor *v.* Watkins, 900
Mercantile Bank of London *v.* Evans, 776
— — Sydney *v.* Taylor, 759
Mercer *v.* Denne, 78, 79, 577, 581, 584, 585, 1101
— *v.* Woodgate, 10
Merchant Banking Co. *v.* Phœnix Bessemer Steel Co., 839
Merest *v.* Harvey, 453, 1304, 1318
Meriton *v.* Coombes, 450
Merivale *v.* Carson, 8, 527, 529
Merrill *v.* Frame, 882
Merry *v.* Green, 355
Merryweather *v.* Nixan, 624, 1414
Mersey Steel and Iron Co. *v.* Naylor, 761, 801
Metcalfe *v.* L. B. & S. C. Ry. Co., 646
Metropolitan Asylum District *v.* Hill, 74
— Asylums Board *v.* Kingham, 843
— Bank *v.* Pooley, 551, 552, 1418
— Omnibus Co. *v.* Hawkins, 1416, 1417
— Ry. Co. *v.* Jackson, 489
— — *v.* Wright, 1289, 1332
— Water Board *v.* New River Co., 75
Meux *v.* Cobley, 883
— *v.* G. E. Ry. Co., 430, 657
Mews *v.* Carr, 714
Mexborough (Earl of) *v.* Whitwood U. D. C., 1269
Meyer *v.* Decroix, 814
Meyerstein *v.* Barber, 913
Mgomini, *Ex parte*, 418, 1427
Michael *v.* Hart, 1311
— *v.* Spiers and Pond, 1292
Middleditch *v.* Ellis, 676
Middleton *v.* Croft, 59, 212
Midland G. W. Ry. Co. *v.* Johnson, 727
— Ry. Co. *v.* Miles, 568
— — *v.* Robinson, 589
Mighell *v.* Sultan of Johore, 663, 1432
Migotti *v.* Colvill, 476
Milan Tramways, *In re*, 787, 788
Milch *v.* Frankau & Co., 1331
Mildred *v.* Maspons, 853
Miles *v.* Furber, 891
— *v.* New Zealand, &c., Co., 689, 708
Milissich *v.* Lloyd's, 536
Mill *v.* Hawker, 623
Millechamp *v.* Johnson, 581
Millen *v.* Brasch, 649
— *v.* Hawery, 965
Miller *v.* Dell, 1138
— *v.* Kirwan, 1268
— *v.* Race, 832
— *v.* Richardson, 870
— & Aldworth, Ltd. *v.* Sharp, 705
— , Gibb & Co. *v.* Smith & Tyrer, 851
Millington *v.* Fox, 619
— *v.* Harwood, 1149
— *v.* Loring, 1219, 1305, 1317
Mills *v.* Armstrong, 497
— *v.* Brooker, 449, 508
— *v.* Colchester (Mayor, &c., of), 80, 84, 584
— *v.* Dunham, 738, 740
— *v.* Fowkes, 753
— *v.* Heywood, 1172
— *v.* Holton, 511
Milton *v.* Studd, 1368
Miner *v.* Gilmour, 593
Minet *v.* Johnson, 1258, 1263
— *v.* Morgan, 1098
Minna Craig S.S. Co. *v.* Chartered Mercantile Bank, 958
Minshull *v.* Oakes, 770
Mitchel *v.* Reynolds, 739
Mitchell *v.* Cantrill, 574
— *v.* Condy, 616
— *v.* Crassweller, 492
— *v.* Homfray, 718
— *v.* Lancs. & Yorks. Ry. Co., 643
— *v.* R., 1183
— Cotts & Co. *v.* Steel Bros., 433, 916
Mitchell-Henry *v.* Norwich Union Insce. Soc., 683
Moddie *v.* Bannister, 1141
Mogul S.S. Co. *v.* McGregor, 257, 259, 264, 265, 407, 424, 541, 630
Mollett *v.* Wackerbarth, 715
Mollwo, March & Co. *v.* Court of Wards, 855
Molton *v.* Camroux, 1388, 1389
Molyneux *v.* Richard, 1168, 1170, 1310
Mondel *v.* Steel, 1319
Monk *v.* Noyes, 884
Monro *v.* Twistleton, 1097
Monsell Bros. *v.* L. & N. W. Ry. Co., 130, 1416
Monson *v.* Tussaud, 539

Montacute (Countess of) *v.* Maxwell, 704, 1171
Montagu *v.* Forwood, 847, 851
Montague *v.* Benedict, 1360, 1362
Montefiore *v.* Guedalla, 785
— *v.* Menday Motor Co., 716, 733, 1276, 1333
Montgomery *v.* Blows, 870
Moon *v.* Towers, 844
Moore *v.* Fulham Vestry, 727, 952
— *v.* Lawson, 521
— *v.* Singer Manufacturing Co., 895
Morant *v.* Chamberlain, 461, 487
Mordaunt *v.* Mordaunt, 1386
Morel Bros. *v.* Earl of Westmoreland, 1361
Morgan, *Ex parte*, *In re* Simpson, 677
— *v.* Blyth, 1446
— *v.* Davies, 901
— *v.* Hardy, 908
— *v.* Ravey, 692
— *v.* Rowlands, 1140
— *v.* Russell, 1306, 1313
— *v.* Thomas, 459
Morison *v.* London, &c., Bank, 390, 823
Morley *v.* Attenborough, 640
— *v.* Loughnan, 677, 718
— *v.* Pincombe, 891
Morpeth R. D. C. *v.* Bullocks Hall Co., 502
Morris, *In re*, 854
— *v.* Baron & Co., 667, 696, 758, 759, 1094
— *v.* Carnarvon C. C., 433
— *v.* Edgington, 881
— *v.* Edwards, 1267
— *v.* Freeman, 1359
— *v.* Saxelby, 738
— *v.* Wright, 606
Morrison *v.* Chadwick, 882, 907
— *v.* Ritchie & Co., 517
— *v.* Sheffield Corp., 496
— *v.* Universal Marine Insurance Co., 646, 845, 933
Morse *v.* Slue, 915
Mortgage Corporation *v.* Commissioners of Inland Revenue, 830
Mortimore *v.* Wright, 694
Morton *v.* Woods, 889
Moses *v.* Macferlan, 949
Moss, *Ex parte*, 781
— *v.* Elphick, 859
— *v.* Gallimore, 889
— *v.* James, 899
— *v.* Moss, 718
— Bay Hematite Co., *In re*, 788
Mosse *v.* Killick, 732
Mostyn *v.* Fabrigas, 419, 1427
Mott *v.* Shoolbred, 243
Mouflet *v.* Cole, 740
Moule *v.* Garrett, 897
Moulis *v.* Owen, 735, 736, 953, 956
Moult *v.* Halliday, 863
Mounsey *v.* Ismay, 581, 585
— *v.* Rankin, 705
Mountstephen *v.* Lakeman, 702
Mousley *v.* Ludlam, 82
Mowbray *v.* Merryweather, 1283, 1299
Moxon *v.* Townshend, 885
Muddock *v.* Blackwood, 1302
Muggleton *v.* Barnett, 77, 79
Muir *v.* Crawford, 837
— *v.* Jenks, 1193
Mulcahy *v.* R., 148, 255, 256
Muller *v.* Baldwin, 70, 72
Mullett *v.* Mason, 1302, 1317
Mullins *v.* Collins, 130
Mumford *v.* Gething, 739
Munday *v.* Asprey, 698
— *v.* Norton, 1009
Mundy *v.* Duke of Rutland, 568
Municipal Council of Sydney *v.* Bourke, 502
Munroe *v.* Pilkington, 956
Munster *v.* Lamb, 532, 1442, 1448
Murray *v.* Bogue, 610
— *v.* Clayton, 603
Murrell *v.* Fysh, 1300
Murtagh *v.* Barry, 1342
Musgrave *v.* Horner, 908
— *v.* Pandelis, 492
— *v.* Pulido, 1427
Musprat *v.* Gordon, 772
Musselburgh Real Estate Co. *v.* Provost, &c., of Musselburgh, 410
Musurus Bey *v.* Gadban, 1432
Mutual Life Assurance Society *v.* Langley, 785
Mutzenbecker *v.* Española, 1002
Mytton *v.* Midland Ry. Co., 652

N.

Nalder *v.* Hawkins, 1377
Nargett *v.* Nias, 890
Nash, *Ex parte*, 1176
— *v.* Inman, 1372
— *v.* Manning, 97
Natal Land, &c., Co. *v.* Pauline Colliery Syndicate, 842, 1422
Nathan, *In re*, 1177
— *v.* Ogdens, Ltd., 764
National Motor Mail Coach Co., *In re*, 1422
— Park Bank *v.* Berggren & Co., 813
— Phonograph Co. *v.* Edison Bell, &c., Co., 259, 262, 627
— Provincial Bank *v.* Harle, 778
— Telephone Co. *v.* Baker, 509
Neal, *In re*, 1404
— *v.* Duke of Devonshire, 583
Neale *v.* Gordon Lennox, 854, 1275, 1442
Neate *v.* Denman, 1439
Neaves *v.* Spooner, 1149
Needham & Co. *v.* Worcestershire C. C., 374
Neilson *v.* James, 89, 429
Nelson *v.* Bridport, 1093
— *v.* Dahl, 88
v. Liverpool Brewery Co., 432, 510
— *v.* Roberts, 788
Netherlands S. A. R. C. *v.* Fisher, 1434
Neville *v.* London "Express" Newspaper, 206, 553, 734
New Brunswick, &c., Ry. Co. *v.* Muggeridge, 724
— Druce-Portland Co. *v.* Blakiston, 1422
— Hamburg Ry. Co., *In re*, 773
— Imperial, &c., Co. *v.* Johnson, 1156

New London Syndicate *v.* Neale, 696, 837
— Orleans S.S. Co. *v.* London, &c., Insurance Co., 1247
— Windsor (Mayor of) *v.* Taylor, 77
— Zealand Shipping Co. *v.* Société des Ateliers, 716
Newbould *v.* Coltman, 483
Newby *v.* Harrison, 579, 580
Newen, *In re*, 1448
Newfoundland Government *v.* Newfoundland Ry. Co., 788
Newhall *v.* Ireson, 425
Newington Local Board *v.* Eldridge, 1446
Newmarch *v.* Clay, 753
Newson *v.* Pender, 572
Newton *v.* Amalgamated Musicians' Union, 545, 628, 1423
— *v.* Boodle, 1357
— *v.* Harland, 451
Nicholls *v.* Evans, 735
— *v.* Stretton, 740
Nichols, *Ex parte*, 772
— *v.* Marsland, 407, 496, 509, 512, 938
Nicholson *v.* Booth, 1044
— *v.* Bradford Union, 672, 1420
— *v.* Harper, 800
— *v.* Ricketts, 951
Nickells *v.* Atherstone, 899
Nickoll *v.* Ashton, 792, 1132
Nicolas *v.* Atkinson, 1290
Nield *v.* L. & N. W. Ry. Co., 594
Niemann *v.* Niemann, 858
Nitedals Taendstikfabrik *v.* Bruster, 849
Noah *v.* Owen, 848
Nobel's Explosives Co. *v.* Jenkins & Co., 1132
— — *v.* Jones, 602
Noble *v.* Durrell, 77
— *v.* National Discount Co., 769
— *v.* Ward, 714
Nocton *v.* Lord Ashburton, 1452
Noden *v.* Johnson, 473
Norcutt *v.* Dodd, 767
Nordenfelt *v.* Maxim-Nordenfelt Gun Co., 738, 739, 740
Normanshaw *v.* Normanshaw, 1099
Norris *v.* Irish Land Co., 1156
— *v.* Seed, 1354
North *v.* Holroyd, 1344
— *v.* Loomas, 1450
North British, &c., Insurance Co. *v.* Lloyd, 946
— *v.* Moffatt, 929
North Cheshire, &c., Brewery Co. *v.* Manchester Brewery Co., 621
North Eastern Marine, &c., Co. *v.* Leeds Forge Co., 458
N. E. Ry. Co. *v.* Lord Hastings, 887
North London, &c., Co. *v.* Moy, 888
North Shore Ry. Co. *v.* Pion, 409, 591
North Sydney Investment Co. *v.* Higgins, 1421
N. W. Ry. Co. *v.* M'Michael, 1376
North-Western Salt Co. *v.* Electrolytic Alkali Co., 716, 738, 1226, 1333
Northcote *v.* Doughty, 1375
Norton *v.* Davison, 712
Notting Hill, The, 1295, 1310, 1312
Nottingham Building Society *v.* Thurston, 1376
Nouvion *v.* Freeman, 956
Novelli *v.* Rossi, 957
Novello *v.* Sudlow, 609
Nugent *v.* Smith, 509, 512, 643, 644, 916, 938
Nuttall *v.* Bracewell, 593

O.

OAKES *v.* Turquand, 720
Oakley *v.* Monck, 878
Oaten *v.* Auty, 1115
Oates *v.* Hudson, 1449
O'Brien, *Ex parte* William, 157
— *v.* R., 146
Ocean Accident Corp. *v.* Ilford Gas Co., 448
O'Connell *v.* R., 255, 265
O'Connor *v.* Majoribanks, 1097
— *v.* Star Newspaper Co., 1002, 1320
Ogden *v.* Ogden, 1019
Ogdens, Ltd. *v.* Nelson, 748, 1132
— *v.* Weinberg, 780, 1404
Ogston *v.* Aberdeen District Tramways Co., 501
Oliver *v.* Fielden, 911
— *v.* Nautilus S.S. Co., 1103
O'Neil *v.* Armstrong, Mitchell & Co., 746, 864
One & All, &c., Association, *In re*, 1411, 1422
Onslow's Trusts, *In re*, 1373
Onward Building Society *v.* Smithson, 677, 678
Oppenheim *v.* White Lion Hotel Co., 641
Oppenheimer *v.* Attenborough & Sons, 846
— *v.* Frazer, 371, 722, 856
Oram *v.* Hutt, 206, 1164
Orford (Mayor of), *v.* Richardson, 15
Orient Co. *v.* Brekke & Howlid, 800
Ormerod *v.* Todmorden Mill Co., 508, 592, 1008
Ormiston *v.* G. W. Ry. Co., 484, 490
Orpwood *v.* Barkes (*vel* Parkes), 524
Orr-Ewing *v.* Colquhoun, 591
Orton *v.* Butler, 467
Osborn *v.* Choqueel, 509
— *v.* Gillett, 495, 561, 1294
O'Shea, *In re*, 736
O'Sullivan *v.* Thomas, 736
Otto Electrical Manufacturing Co., *In re*, 1422
Overend, Gurney & Co. *v.* Oriental Financial Corporation, 822
Overseers of Walsall *v.* L. & N. W. Ry. Co., 996
Overton *v.* Freeman, 493
Owen *v.* Cronk, 952
— *v.* Routh, 1311
Oxford (Mayor of) *v.* Crow, 671, 844
Oxlade and N. E. Ry. Co., *In re*, 652
Oxley *v.* Wilkes, 1278

P.

P. & O. Steam Navigation Co. *v.* Shand, 648
Paddock *v.* Forrester, 1103
Padstow Total Loss Association, *In re*, 1411
Page, *In re*, 898
— *v.* Morgan, 710
— *v.* Newman, 1152
Paget *v.* Marshall, 726, 727
Paine *v.* Hutchinson, 1169
Palk *v.* Skinner, 574
Palmer *v.* Bramley, 755
— *v.* Cohen, 1398
— *v.* Culverwell, 778
— *v.* Guadagni, 1218
— *v.* Johnson, 724
— *v.* Palmer, 1216
— *v.* Snow, 731
— *v.* Wick Steam Shipping Co., 947
Pankhurst *v.* Hamilton, 1322
Papé *v.* Westacott, 845, 854, 1317, 1450
Pappa *v.* Rose, 420
Pappin *v.* Maynard, 252
Paquin, Ltd. *v.* Beauclerk, 1336, 1361
Paradine *v.* Jane, 756
Parana, The, 1295, 1310, 1312
Parker *v.* Bristol and Exeter Ry. Co., 1028
— *v.* Clegg, 101
— *v.* G. W. Ry. Co., 75
— *v.* L. C. C., 1139
— *v.* London General Omnibus Co., 501
— *v.* McKenna, 1294
— *v.* S. E. Ry. Co., 639, 647, 687
— *v.* Staniland, 707
Parkes *v.* Prescott, 518
Parlement Belge, The, 1432
Parmiter *v.* Coupland, 528
Parr's Bank *v.* Yates, 701
Parry *v.* Smith, 416, 493
Partridge *v.* Mallandaine, 736
Pasley *v.* Freeman, 554, 721
Pater *v.* Baker, 541, 543
Paterson *v.* Gandasequi, 852
Patmore *v.* Colburn, 624, 758
Patrick, *In re*, 784
— *v.* Colerick, 965
Patscheider *v.* G. W. Ry. Co., 658
Pattle *v.* Hornibrook, 696
Paul *v.* Summerhayes, 452
Pauling *v.* L. & N. W. Ry. Co., 672
Pawson, *In re*, 1406
— *v.* Watson, 721
Paxton *v.* Popham, 679
Payne *v.* Elsden, 794
— *v.* Lord Leconfield, 853
— & Co., *In re*, 844
Payton *v.* Snelling, 621
Peacock *v.* Peacock, 862
— *v.* Purcell, 827
Pearce *v.* Brookes, 741
— *v.* Foster, 864
— *v.* Gardner, 698
Pearkes, Gunston & Tee, Ltd. *v.* Ward, 504, 1416
Pearl Life Assurance Co. *v.* Johnson, 926
— Mill Co. *v.* Ivy Tannery Co., 1110
Pearse *v.* Boulter, 846
Pearson *v.* Commercial Union Assurance Co., 930
— *v.* Garrett, 812
— *v.* Lemaitre, 1089
— *v.* Scott, 89
— S., & Son *v.* Dublin Corporation, 722, 1418
Pease *v.* Chaytor, 483
Peck *v.* Hindes, Ltd., 598
Peebles *v.* Oswaldtwistle U. D. C., 502
Peek *v.* Gurney, 427, 437, 556, 721, 724, 1393, 1395
— *v.* North Staffs. Ry. Co., 647, 648, 699
Peel *v.* L. & N. W. Ry. Co., 1412
Peirce *v.* Corf, 713, 714
Pemberton *v.* Hughes, 955, 956
Penn *v.* Jack, 601
Pennington *v.* Brinsop Hall Coal Co., 508
Penny *v.* Brice, 1134, 1397
— *v.* Hanson, 232
Penrose *v.* Martyr, 823
Perceval *v.* Phipps, 604
Percival *v.* Dunn, 777
— *v.* Hughes, 493
— *v.* Stamp, 445
Perring *v.* Emmerson, 894
Perry *v.* Attwood, 948
— *v.* Barnett, 88, 429
— *v.* Eames, 571
— *v.* Fitzhowe, 967
Peruvian Guano Co. *v.* Dreyfus, 1319
— Ry. Co. *v.* Thames Insurance Co., 837
Peter *v.* Compton, 708
— *v.* Kendall, 899
Peters *v.* Fleming, 1372
— *v.* Jones, 564
Peto *v.* Reynolds, 830
Petre *v.* Duncombe, 1152
Pharmaceutical Society *v.* London, &c., Supply Association, 136, 1416
Phelps *v.* City of London Corporation, 512, 881
— *v.* L. & N. W. Ry. Co., 656
Philipps *v.* Halliday, 569
— *v.* Philipps, 441, 1265, 1270
Philips *v.* Philips, 1141
Philipson *v.* Earl of Egremont, 669
Phillimore *v.* Machon, 214, 1179
Phillips *v.* Alhambra Palace Co., 865
— *v.* Barnet, 1358
— *v.* Eyre, 418, 1427
— *v.* Foxall, 725
— *v.* Homfray, 1171, 1286, 1288, 1395, 1396
— *v.* Innes, 731
— *v.* L. & S. W. Ry. Co., 1289, 1302 1334
Philpott *v.* Jones, 753
Phipps *v.* Jackson, 908
— *v.* New Claridge Hotel, 1107
Phosphate Sewage Co. *v.* Molleson, 1334, 1342
Pianciani *v.* L. & S. W. Ry. Co., 650

Pickard *v.* Seers, 1111, 1170
Picker *v.* London and County Bank, 839
Pickering *v.* Busk, 841
— *v.* Ilfracombe Ry. Co., 729, 783
— *v.* James, 415, 435
— *v.* Willoughby, 1044
Picton's Case, 1427
Pierce *v.* Blake, 1454
Piercy *v.* Fynney, 858
Pigot's Case, 678, 680, 762
Pike *v.* Carter, 484
— *v.* Nicholas, 606
— *v.* Ongley, 86, 88, 714
Pilkington *v.* Power, 1202
Pilling, *In re*, *Ex parte* Salaman, 1405
Pine's Case, 148
Pinet et Cie. *v.* Maison Louis Pinet, 617
Pinhorn *v.* Souster, 902
Pinnel's Case, 764
Pinnington *v.* Galland, 568
Pisani *v.* Lawson, 1434
Pittard *v.* Oliver, 538
Planche *v.* Colburn, 748
Plant *v.* Bourne, 697
Platt, *In re*, 1381
Playford *v.* U. K. Telegraph Co., 486
Plimmer *v.* Mayor of Wellington, 567, 579
Plumer *v.* Gregory, 1455
Plummer, *In re*, 1450
Plummer's Case, 135
Plumpton *v.* Burkinshaw, 1389
Plunkett *v.* Cobbett, 1099
Plymouth, &c., Tramways Co. *v.* General Tolls Co., Ltd., 73
Polglass *v.* Oliver, 832
Polhill *v.* Walter, 721, 850
Pollard, *Ex parte*, 1069
— *In re*, 1015
Polsue & Alfieri, Ltd. *v.* Rushmer, 1156
Pomfret *v.* Lancs. & Yorks. Ry. Co., 497, 872, 1107
Pontida, The, 919
Ponting *v.* Noakes, 508
Poole's Case, 707
Pope *v.* Hawtrey, 1147
Popham *v.* Pickburn, 536
Poplett *v.* Stockdale, 741
Pordage *v.* Cole, 674
Porter *v.* Freudenberg, 663, 1434
Pottle *v.* Sharp, 863
Potts, *In re*, *Ex parte* Taylor, 1165
— *v.* Niddrie, &c., Coal Co., 870
Poulterer's Case, 258
Poulton *v.* Kelly, 618
— *v.* Lattimore, 1319
— *v.* L. & S. W. Ry. Co., 844
Powell *v.* Birmingham Vinegar Co., 616, 619
— *v.* Fall, 488
— *v.* Gelston, 518
— *v.* Hoyland, 370
— *v.* Kempton Park, 71
— *v.* Lee, 685
— *v.* London and Provincial Bank, 671
— *v.* Powell, 718
— *v.* Smith, 725
— & Thomas *v.* Evans Jones & Co., 849
Powell Duffryn Steam Coal Co. *v.* Taff Vale Ry. Co., 1169
Powell's Trade Mark, *In re*, 611
Praed *v.* Graham, 1089, 1289, 1318, 1321, 1334
Pratt *v.* British Medical Association, 628
— *v.* Martin, 342
Prehn *v.* Royal Bank of Liverpool, 1296, 1307
Preist *v.* Last, 794
Premier Industrial Bank *v.* Carlton, &c., Co., 823
Prested Miners Co. *v.* Gardner, 708
Preston *v.* Luck, 1170
— *v.* Norfolk Ry. Co., 510
Preston's Case (Lord), 148
Price *v.* Berrington, 1388
— *v.* Green, 740, 1316
— *v.* Seeley, 478
Price's Patent Candle Co. *v.* L. C. C., 512
Prickett *v.* Badger, 848
Priddy *v.* Rose, 767
Priestley *v.* Fowler, 867
Prince *v.* Haworth, 1373
Prince of Wales Dry Dock Co. *v.* Fownes & Co., 1299
— Insurance Co. *v.* Palmer, 920
Printing, &c., Co. *v.* Sampson, 742, 772
Pritchard *v.* Peto, 432
— *v.* Roberts, 1377
Pritchett Co. *v.* Currie, 798
Proctor *v.* Bayley, 604
Produce Brokers' Co. *v.* Blyth & Co., 969
Protector Loan Co. *v.* Grice, 1316
Proudfoot *v.* Hart, 884
Pryse, *In re*, 1258
Pudsey Coal Gas Co. *v.* Bradford Corporation, 265
Pugh *v.* Arton, 903
— *v.* L. B. & S. C. Ry. Co., 941, 1303
Pulbrook, *Ex parte*, 180
— *v.* Lawes, 706
Pullin *v.* Deffel, 9
Pulling *v.* G. E. Ry. Co., 1396
Pullman *v.* Hill, 69, 518, 863
Purcell *v.* Sowler, 528
Pwllbach Colliery *v.* Woodman, 512
Pye *v.* British Automobile Syndicate, 1315
— *v.* Butterfield, 1268
Pyke, *Ex parte*, *In re* Lister, 736
Pym *v.* Campbell, 696, 1094
Pyne *v.* Dor, 886
Pyper *v.* Manchester Liners, Ltd., 944

Q.

QUARMAN *v.* Burnett, 491
Quarrier *v.* Colston, 736
Quartz Hill, &c., Co. *v.* Beall, 539, 1160
— — *v.* Eyre, 475, 551, 552
Quincey *v.* Sharp, 1141
Quinn *v.* Leathem, 33, 66, 256, 262, 263, 264, 423, 541, 562, 563, 627, 628, 631, 632
Quirk *v.* Thomas, 1305, 1374, 1396

R.

R. *v.* Abramovitch, 384, 1106
— *v.* Adams (1812), R. & R. 225...370
— *v.* — (1888), 22 Q. B. D. 66...177
— *v.* Aden, 350
— *v.* Ahlers, 145, 147
— *v.* Alderson, 1453
— *v.* Alexander, 285, 1386
— *v.* Algernon Sidney, 148
— Algoma Central Ry. Co. *v.*, 69
— *v.* Alison, 282
— *v.* All Saints', Wigan, 1176
— *v.* — , Worcester, 1098
— *v.* Allen (1848), 3 Cox, 270...226
— *v.* — (1872), L. R. 1 C. C. R. 367...216
— *v.* Anderson, 138
— *v.* Annie Dennis, 129
— *v.* Antonelli, 157, 176
— *v.* Antrobus, 189
— *v.* Archbishop of Canterbury, 59, 212, 1176
— *v.* Ashwell, 347, 351, 353
— *v.* Aspinall, 258
— *v.* Assessment Committee of City of London Union, 1177
v. Atkins, 1127
— *v.* Audley, 216
v. Aylett, 1055
— *v.* Badash, 384
— *v.* Baines, 1105
— *v.* Baird, 369, 375
— *v.* Baker (1891), 113 C. C. C. Sess. Pap. 374...201
— *v.* — [1895] 1 Q. B. 797...199
— *v.* Ball, 999, 1089
— *v.* Bank of England (1780), 2 Douglas, 524...1177
— *v.* — (1819), 2 B. & Ald. 620...1175
— *v.* Banks, 330, 1075
— *v.* Barker, 250
— *v.* Barnard, 367
— *v.* Barraclough, 1088
— *v.* Barratt, 319
— *v.* Barron, 1073, 1124
— *v.* Barronet, 313
— *v.* Bartholomew, 248
— *v.* Bate and others, 307
— *v.* Bauld, 261
— *v.* Beard, 125, 277, 999, 1385
— *v.* Bedingfield, 1091
— *v.* Beesby, 1049
— *v.* Bell (1798), 7 T. R. 600...73
— *v.* — (1859), 8 Cox, 287...1181
— *v.* Benchers of Gray's Inn, 1177, 1439
v. — Lincoln's Inn, 1439
— *v.* Bennett, 245, 296
— *v.* Bernadotti, 1092
— *v.* Betridge, 1127
— *v.* Betts, 248
v. Bexley, 283
— *v.* Bickerton, 1069
Bickley *v.*, 225
— *v.* Biggin, 1096
v. Biggleswade R. D. C., 250
R. *v.* Billingham, 289
— *v.* Birchall, 286
— *v.* Bird, 1078
— *v.* Birmingham, &c., Ry. Co., 1416
— *v.* Birt and others, 161
— *v.* Bishop, 118
— *v.* Bjornsen, 138
— *v.* Blake, 1091
— *v.* Bloodwort, 232
— *v.* Bolus, 117
— *v.* Booth, 220
— *v.* Boughton, 1181
— *v.* Boult, 386
— *v.* Boulter, 213
— *v.* Boyes, 1098
— *v.* Boyle and Merchant, 334, 1089
— *v.* Boynes, 1101
— *v.* Bradlaugh, 213
— *v.* Bradlaugh and Besant, 983
— *v.* Bradshaw, 289, 303
— *v.* Brailsford, 256, 258, 259
— *v.* Brain, 266
— *v.* Bramley, 349
— *v.* Brawn and Webb, 215, 216
— *v.* Brice, 393
— *v.* Briggs, 1118
— *v.* Bristol and Exeter Ry. Co., 1176
— *v.* Brown (1857), 7 E. & B. 757...1176
— *v.* — (1870), L. R. 1 C. C. R. 244...308
— *v.* — (1889), 24 Q. B. D. 357...111
— *v.* — (1889), 63 J. P 790...225
— *v.* Bryan, 368
— *v.* Bubb, 135
— *v.* Buchanan, 108
— *v.* Buckmaster, 349, 350, 371
— *v.* Burdett, 1112
— *v.* Burgess (1862), L. & C. 258...309
— *v.* — (1885), 16 Q. B. D. 141...209
— *v.* Burns and others, 162
— *v.* Byers, 246
— *v.* Byron (Lord), 286
— *v.* Cabbage, 352
— *v.* Cade, 391
— *v.* Campbell, 344.
— *v.* Campbell, Douglas, 1084
— *v.* Camplin, 326
— *v.* Canterbury (Archbishop of), 59, 212, 1176
— *v.* Carey, 287
— *v.* Carlile, 1356
— *v.* Carroll, 1385
— *v.* Casement, 147, 1479
— *v.* Casey, 1068
— *v.* C. C. C. (Justices of), 994, 1120, 1176
— *v.* Chainey, 223
— *v.* Chambers, 1180
— *v.* Chandler, 394
— *v.* Charlesworth, 248
— *v.* Cherry, 356
— *v.* Child (1830), 4 C. & P. 442...166
— *v.* — (1871), L. R. 1 C. C. R. 307...122, 124, 403
— *v.* Chillesford (Inhabitants of), 1370
— *v.* Chitson, 1096
— *v.* Christie, 381, 999, 1090
— *v.* Clarence, 329

R. *v.* Clemens, 404
— *v.* Clinton, 459
— *v.* Closs, 386
— *v.* Cockshaw, 1069
— *v.* Coelho, 1383
— *v.* Cohen (1851), 2 Den. C. C. 249...344
— *v.* — (1868), 11 Cox, 99...1355
— *v.* Collier, 386
— *v.* Collins (1839), 9 C. &. P. 456...158
— *v.* — (1864), 9 Cox, 497...111
— *v.* Commissioners of Inland Revenue, 190
— *v.* — Southampton, 1178
— *v.* — Treasury, 1176
— *v.* Coney and others, 282, 290, 320
— *v.* Connor, 312
— *v.* Cook, 308
— *v.* Cooke, 361
— *v.* Cooper (1874), L. R. 2 C. C. R. 123...1457
— *v.* — (1875), 1 Q. B. D. 19...1088
— *v.* — (1877), 2 Q. B. D. 510...367
— *v.* Copeland, 368
— *v.* Cork (Justices of), 186
— *v.* Cornalbas, 291
— *v.* Cory, 341
— *v.* Costello and Bishop, 863
— *v.* Cox, 1101
— *v.* Cramp, 225
— *v.* Crawley (1862), 3 F. & F. 109...289
— *v.* — (1908), 72 J. P. 270...1126
— *v.* Creamer, 345
— *v.* Crewe (Earl of), 1427
— *v.* Crompton U. D. C., 250
— *v.* Crossley, 197
— *v.* Crunden, 226
— *v.* Cruse, 1355
— *v.* Cumpton, 477
— *v.* Cunningham, 73
— *v.* Cunninghame Graham, 163
— *v.* Curgerwen, 217
— *v.* Curl, 214, 227
— *v.* Curnock, 1091, 1106
— *v.* Dant, 281, 304
— Darley *v.*, 1182
— *v.* Davies (1856), Dearsl. 640...351
— *v.* — [1906] 1 K. B. 32...203
— *v.* — [1909] 1 K. B. 892...1117
— *v.* — (No. 2) (1919), 29 Times L. R. 350...269
— *v.* Davis (1881), 14 Cox, 563...125, 1385
— *v.* — (1883), 15 Cox, 174...271
— *v.* — [1917] 2 K. B. 855...1119
— *v.* Day (1841), 9 C. & P. 722...330
— *v.* — (1845), 1 Cox, 207...317
— *v.* De Banks, 350
— *v.* De Berenger, 258
— *v.* Dee, 319
— *v.* De La Motte, 146
— *v.* Delaval, 258
— *v.* De Marny, 230
— *v.* De Mattos, 1433
— *v.* Dennis, Annie, 129
— *v.* Derbyshire, &c., Ry. Co., 1177
— *v.* Desmond and others, 281
— *v.* Dibdin, 1353
— *v.* Dickenson, 1127
R. *v.* Dickinson, 233
— *v.* Dickman, 1128
— *v.* Dixon (1716), 10 Mod. 335...1355
— *v.* — (1814), 4 Camp. 12...375
— *v.* Doherty, 277
— *v.* Doody, 1385
— *v.* Douglas Campbell, 1084
— *v.* Downes, 294
— *v.* Duckworth, 111, 306, 320, 471
— *v.* Dudley and Stephens, 127, 274, 1082
— Dugdale *v.*, 110
— *v.* Duguid, 223, 257
— *v.* Dunleavey, 1124
— *v.* Dunleavy, 369
— *v.* Dunn, 973
— *v.* Dunning, 197
— *v.* Dyson (1823), R. & R. 523...282
— *v.* — [1908] 2 K. B. 454...269, 273, 1125
— *v.* Eagle, 285, 287
— *v.* Eagleton, 111
— *v.* Edmundson, 349
— *v.* Edwards, 191
— *v.* Eldershaw, 329
— *v.* Elliott, 1126
— *v.* Ellis, 369, 1089
— *v.* Ensor, 176
— *v.* Entwistle, 232
— *v.* Ettridge, 1124
— *v.* Evans (1812), 2 Russ. Cr. 666...270
— *v.* — (1842), Car. & M. 298...214, 396
— *v.* — [1915] 2 K. B. 762...233
— *v.* Eve, 1069
— *v.* Eyre, 1427
— *v.* F——, 1379
— *v.* Fagent, 1092
— *v.* Falkingham, 312
— *v.* Farnham County Court Judge, 1339
— *v.* Farrant, 1178, 1179
— *v.* Farrell, 333
— *v.* Farrington, 122
— *v.* Faulkner, 124, 399
— Feather *v.*, 1183
— *v.* Feigenbaum, 1100
— Felstead *v.*, 999, 1123
— *v.* Fenton, 281, 290
— *v.* Firth, 355
— *v.* Fisher, 369, 1089
— *v.* Flannagan, 392
— *v.* Flatman, 346
— *v.* Flattery, 319, 326
— *v.* Fletcher, 319
— *v.* Flowers, 347, 351
— *v.* Flynn, 271
— *v.* Forbes and Webb, 118, 122, 204
— *v.* Foster (1834), 6 C. & P. 325...1091
— *v.* — (1877), 2 Q. B. D. 301...367
— *v.* Fowkes, 1091
— *v.* Francis, 1113
— *v.* Franklin, 290
— *v.* Franz, 272, 276
— *v.* Friel, 1073
— *v.* Frost, 146
— *v.* Fullagar, 1457
— *v.* Fursey, 162
— *v.* Galway (Justices of), 996
— *v.* Gardner (1774), Cowp. 79...1416
— *v.* — (1824), 1 C. & P. 479...182

R. *v.* Gardner, [1899] 1 Q. B. 150...1080
— *v.* Gathercole, 176
— *v.* Gaunt, 1044
— *v.* Gaylor, 281
— *v.* Geering, 1089
— *v.* George (1868), 11 Cox, 41...308
— *v.* — (1909), 73 J. P. 11...1078
— *v.* Gibbons, 199, 1090
— *v.* Gibson, 1091
— *v.* Giles, 368
— *v.* Gloster, 1092
— *v.* Godolphin, 1177
— *v.* Goldberg, 1049
— *v.* Goodbody, 360
— *v.* Goode, 1386
— *v.* Gordon, 1109
— *v.* — (Lord George), 146, 168, 1091
— *v.* Gould, 369, 1115
— *v.* Gray (1866), 4 F. & F. 1102...1089
— *v.* — [1900] 2 Q. B. 36...204
— *v.* Gray's Inn Benchers, 1177, 1439
— *v.* G. N. Ry. Co., 1416
— *v.* G. W. Ry. Co., 1176, 1177
— *v.* Green, 118
— *v.* Greenacre, 274
— *v.* Greening, 286
— *v.* Gregg, 146
— *v.* Gregory, 110
— *v.* Grey (Lord), 258
— *v.* Griffin, 303, 318
— *v.* Grimes, 270
— *v.* Grindley, 277
— *v.* Gross, 302
— *v.* Grosvenor, 367
— *v.* Grout, 1096
— *v.* Grubb, 364
— *v.* Hadwen, 1096
— *v.* Halifax County Court (Judge of), 603, 1031
— *v.* Hall, 334
— *v.* Halliday, 270, 322
— *v.* Hammersmith Registrar, 218
— *v.* Hammond, 1355
— *v.* Hampshire 1128
— *v.* Hancock, 382
— *v.* Hanson, 245
— *v.* Harding (1690), 2 Vent. 315...146
— *v.* — (1909), 53 Sol. Jo. 762...1089
— *v.* Hardy, 1091, 1099
— *v.* Hare, 200
— *v.* Harland, 170
— *v.* Harman, 332
— *v.* Harper, 389
— *v.* Harris (1866), 10 Cox, 352...247
— *v.* — (1882), 95 C. C. C. Sess. Pap. 523...399
— *v.* Harrison, 1177
— *v.* Harvey, 122, 377
— *v.* — and Chapman, 157
— *v.* Hassall, 350
— *v.* Haswell, 206
— *v.* Haughton, 122
— *v.* Hausmann, 1068, 1123
— *v.* Hayward, 288
— *v.* Hazelton, 367
— *v.* Heane, 197, 1073
— *v.* Hedges, 903
— *v.* Hehir, 348
R. *v.* Hendry, 1127
— *v.* Henkers, 221
— *v.* Hensey, 147
— *v.* Hermann, 376
— *v.* Heseltine, 1093
— *v.* Hibbert, 118, 221
— *v.* Hicklin, 114, 228, 229
— *v.* Higgins, 110, 134
— *v.* Higley, 309
— *v.* Hilton, 267
— *v.* Hind, 1092
— *v.* Hodgkinson, 1084
— *v.* Hodgkiss, 194, 1083
— *v.* Holbrook, 179
— *v.* Holland, 271
— *v.* Holloway, 353
— *v.* Holmen, 1082
— *v.* Holmes, 327, 1089, 1090
— *v.* Holt, 1322
— *v.* Hook, 200
— *v.* Hopley, 303
— *v.* Hopper, 275, 1081, 1125
— *v.* Horne, 1070
— *v.* Horsey, 122
— *v.* Howell (1839), 9 C. & P. 437...162
— *v.* — (1864), 4 F. & F. 160...258
— *v.* Hudson, 374
— *v.* Huggins, 292, 296
— *v.* Hughes (1813), 2 Lewin, 229...1355, 1356
— *v.* — (1832), 1 Moo. C. C. 370...360
— *v.* — (1841), 2 Moo. C. C. 190...326
— *v.* — (1879), 4 Q. B. D. 614...198
— *v.* Hull, 281
— *v.* Hunt, 161, 1091, 1113
— *v.* Incorporated Law Society, 1458, 1459
— *v.* Inhabitants of All Saints', Wigan, 1176
— *v.* — All Saints', Worcester, 1098
— *v.* — Chillesford, 1370
— *v.* — Northampton, 10
— *v.* — Sourton, 1099
— *v.* — Woodland, 73
— *v.* Inland Rev. (Commissioners of), 190
— *v.* Instan, 106, 268, 269, 293
— *v.* Izod, 295, 308
— *v.* Jackson, 478, 1175, 1354
— *v.* James (1837), 8 C. & P. 131...130
— *v.* — (1844), 1 C. & K. 530...316, 317
— *v.* — (1872), 12 Cox, 127...1073
— *v.* — and Johnson, 346
— *v.* Jameson, 173
— *v.* Jane Robson, 344
— *v.* Jarvis, 289
— *v.* Jean Peltier, 157, 1433
— *v.* Jeffs, 1181
— *v.* Jenkins, 1092
— *v.* Jessop, 282
— Johnson *v.*, 1153
— *v.* Johnson, 393
— *v.* Joliffe, 78, 584
— *v.* Jones (1812), 3 Camp. 230...248
— *v.* — (1861), 4 L. T. (O. S.) 151...326
— *v.* — (1870), 11 Cox, 544...267
— *v.* — (1874), 12 Cox, 628...121

R. *v.* Jones (1884), 15 Cox, 475...370
— *v.* — [1898] 1 Q. B. 119...367, 375
— *v.* — (1908), 72 J. P. 215...285, 286
— *v.* — [1918] 1 K. B. 416...1064
— *v.* Jordan, 329
— *v.* Joule, 1181
— *v.* Judge of City of London Court, 72
— *v.* — County Court of Farnham, 1339
— *v.* — — Halifax, 603, 1031
— *v.* — — Oxfordshire, 1447
— *v.* — — Surrey, 203, 1341
— *v.* Judge Selfe, &c., 1339
— *v.* Justices of C. C. C., 994, 1120, 1176
— *v.* — Cork, 186
— *v.* — Galway, 996
— *v.* — Londonderry, 162, 1181
— *v.* — Manchester, 1180
— *v.* — Sunderland, 1180
— *v.* — Surrey, 1180, 1181
— *v.* — West Riding, 224
— *v.* — Worcestershire, 1175
— *v.* Kelly, 274
— *v.* Kempson, 289
— *v.* Kennaway, 1096
— *v.* Kennett, 166
— *v.* Kenny, 345, 382
— *v.* Kensington, 190
— *v.* — Income Tax Commissioners, 1179
— *v.* Ketteridge, 1073, 1082
— *v.* Kettle (Sir Rupert), 1343
— *v.* Kew, 267
— *v.* Keyn, 138
— *v.* King, 183, 1073
— *v.* Kirkham, 1127
— *v.* Knight, 1355
— *v.* Knowles, 323
— *v.* Kurasch, 395, 1089, 1125
— *v.* Labouchere (1880), 14 Cox, 419...178
— *v.* — (1884), 12 Q. B. D. 320...174, 175, 1068
— *v.* Lambourn Valley Ry. Co., 1177
— *v.* Langford, 163
— *v.* Langmead, 1106
— *v.* Langton, 1108
— *v.* Lapier, 333
— *v.* Latimer, 124, 321
— *v.* Laws, 1127
— Leach *v.*, 999, 1098
— *v.* Lee, 368
— *v.* Lefroy, 203, 1341
— *v.* Lesbini, 285
— *v.* Lesley, 1432
— *v.* Levy, 202
— *v.* Lewis (1857), 26 L. J. M. C. 104...138, 1433
— *v.* — (1869), 11 Cox, 404...258
— *v.* Lewisham Guardians, 1176
— *v.* Light (1857), Dearsl. & B. 332...480
— *v.* — (1915), 84 L. J. K. B. 865...370
— *v.* Lillyman, 328, 1091
— *v.* Linneker, 111, 276, 306, 320
— *v.* Lister, 41, 106
— *v.* Llanfaethly, 553
R. *v.* Lloyd, 198
— *v.* Local Government Board, 1179
— *v.* Lock, 319, 330
— *v.* Lockett, 1064
— *v.* Lolley, 219
— *v.* London (Lord Mayor of), 1098, 1358
— *v.* Londonderry (Justices of) (1891), 28 L. R. Ir. 440...162
— *v.* — [1905] 2 Ir. R. 318...1181
— *v.* Lord, 1374
— *v.* Lovell, 331, 346
— *v.* Lovett, 1127
— *v.* Lowe, 267
— *v.* Lumley, 269, 278, 281
— *v.* Lydford, 1050, 1368
— *v.* Lynch, 143, 147, 148, 1064, 1073
— *v.* M'Athey, 383
— *v.* MacDaniel, 269, 333
— *v.* McDonald, 1369
— *v.* McGrath, 331, 346
— *v.* M'Growther, 127
— *v.* McKale, 349
— *v.* Macleod, 296
— *v.* McMahon, 1106
— *v.* M'Naghten, 1383, 1384
— *v.* McNair, 1095
— *v.* McNaughten, 289
— *v.* Mahon, O'Gorman, 324
— *v.* Malvisi, 1127
— *v.* Manchester (Justices of), 1180
— *v.* Mankletow, 220
— *v.* Mann, 112, 309
— *v.* Manning (1672), Sir T. Raym. 212...286
— *v.* — (1849), 2 C. & K. 903, n....70, 1355
— *v.* Marriott, 268
— *v.* Marshall (1855), 4 E. & B. 475...1068
— *v.* — (1899), 63 J. P. 37...1096
— *v.* Martin (1827), 3 C. & P. 211...267
— *v.* — (1832), 5 C. & P. 128...269
— *v.* — (1872), L. R. 1 C. C. R. 378...1082
— *v.* — (1881), 8 Q. B. D. 54...124, 322
— *v.* — (1908), 1 Cr. App. R. 33...1127
— *v.* Mason (1756), Fost. 132...288
— *v.* — (1820), R. & R. 419...332
— *v.* Mawbey, 194, 199
— *v.* Mawgridge, 301
— *v.* May, 1108
— *v.* Meade, 116, 125, 277, 1385
— *v.* Meakin, 1385
— *v.* Merceron, 188
— *v.* Messer, 364
— *v.* Middleton, 131, 347, 348
— *v.* Miller (1876), 13 Cox, 179...221
— *v.* — (1879), 14 Cox, 356...320
— *v.* Millis, 68
— *v.* Mills, 369
— Mitchell *v.*, 1183
— *v.* Mitchell, 1092
— *v.* Monks, 270
— *v.* Moon, 223

R. *v.* Moore (1832), 3 B. & Ad. 184...116
— *v.* — (1852), 3 C. & K. 319...1385
— *v.* Morby, 268, 294
— *v.* Morris (1814), Russ. & Ry. 270...1356
— *v.* — (1867), L. R. 1 C. C. R. 90...325, 1073
— *v.* Mortimer, 1127
— *v.* Mosley, 1092
— *v.* Most, 71, 157, 255
— *v.* Motte, De La, 146
— *v.* Mucklow, 346, 351
— Mulcahy *v.*, 148, 255, 256
— *v.* Munslow, 180
— *v.* Murphy (1833), 6 C. & P. 103...282, 320
— *v.* — (1876), 13 Cox, 298...367
— *v.* Murray and others, 345, 1355
— *v.* Muscot, 1100
— *v.* Mutters, 248
— *v.* Naguib, 217
— *v.* Nash, 386
— *v.* Nattrass, 399
— *v.* Negus, 360
— *v.* Nettleton, 360
— *v.* Newboult, 1065
— *v.* Newman (1853), 1 E. & B. 268...178, 1322
— *v.* — (1882), 8 Q. B. D. 706...1457
— *v.* Nicholas, 1095
— *v.* Nicholls, 268
— *v.* Noakes, 1059
— *v.* Norcott, 328, 1091
— *v.* Norman, 1064
— *v.* Norris, 1100
— *v.* Northampton (Inhabitants of), 10
— *v.* Norton, 1090
— O'Brien *v.*, 146
— *v.* O'Brien, 1073
— O'Connell *v.*, 255, 265
— *v.* O'Gorman Mahon, 324
— *v.* Olifier, 220
— *v.* Ollis, 369
— *v.* Orbell, 258
— *v.* Osborn, 176
— *v.* Osborne, 328, 1091
— *v.* Owen, 1368
— *v.* Oxford, 151
— *v.* — Bishop of, 1177
— *v.* Oxfordshire, 249
— *v.* — (County Court Judge), 1447
— *v.* — (Justices of), 988
— *v.* Oxlade, 1118
— *v.* Packer, 221
— *v.* Pagham Commissioners, 594
— *v.* Paine, 292
— *v.* Palin, 362
— *v.* Palmer, 285, 286, 1093
— *v.* Pardoe, 397
— *v.* Parke, 202, 203
— *v.* Parker (1839), 9 C. & P. 45...399
— *v.* — (1870), L. R. 1 C. C. R. 225...1065
— *v.* Parnell, 265
— *v.* Payne, 345, 383
— *v.* Peacham, 148
R. *v.* Pearson (1835), 2 Lewin, 216...286
— *v.* — (1908), 72 J. P. 451...343, 383
— *v.* Pease, 245
— *v.* Peel, 1092
— *v.* Peltier, 157, 1433
— *v.* Pembliton, 124, 279, 403
— *v.* Perkins, 289
— *v.* Perrin, 257
— *v.* Petch, 341
— *v.* Philipps, 134
— *v.* Philips, 329
— *v.* Phillis, 285
— *v.* Pike, 1092
— *v.* Pinckney, 157, 202
— *v.* Pinney, 166, 167, 189
— *v.* Pitt, 192
— *v.* Pitts, 270
— *v.* Plummer, 257, 1072
— *v.* Pocock, 267
— *v.* Poole, 353
— *v.* — (Mayor of), 250
— *v.* Porter, 259, 733, 1056
— *v.* Poulton, 266
— *v.* Powell, 1176
— *v.* Pratt (1855), 4 E. & B. 860...9
— *v.* — (1865), 4 F. & F. 315...384
— *v.* Preston (1851), 2 Den. C. C. 353...351, 354
— *v.* — [1909] 1 K. B. 568...1096
— *v.* Price, 205, 246
— *v.* Pridgeon, 1426
— *v.* Prince (1868), L. R. 1 C. C. R. 150...372
— *v.* — (1875), L. R. 2 C. C. R. 154...118, 221
— *v.* Pritchard, 1386
— *v.* Probert, 246
— *v.* Pym, 271
— *v.* Rainham (Inhabitants of), 865
— *v.* Ram, 329
— *v.* Ramsay and Foote, 213
— *v.* Randall, 251
— *v.* Read, 341
— *v.* Reed (1853), Dearsl. 168, 257...360
— *v.* — (1871), 12 Cox, 1...225
— *v.* Reeves, 158
— *v.* Registrar of Joint Stock Companies, 1177
— *v.* Rhodes, 369, 1088, 1096, 1097
— *v.* Rice (1803), 3 East, 581...183
— *v.* — (1866), L. R. 1 C. C. R. 21...224
— *v.* Richardson, 1089
— *v.* Rickard, 1093
— *v.* Riley (1887), 18 Q. B. D. 481...327, 1089
— *v.* — [1896] 1 Q. B. 309...389
— *v.* Ring, 111
— *v.* Ritson, 390
— *v.* Robins, 220
— *v.* Robinson (1864), 4 F. & F. 43...382, 384
— *v.* — [1915] 2 K. B. 348...111
— *v.* Robson, Jane, 344
— Rochester (Mayor of) *v.*, 1177
— *v.* Rodley, 395, 1125
— *v.* Roe, 22, 241
— *v.* Rogers (1702), 7 Mod. 29...203

R. *v.* Rogers (1914), 24 Cox, 465...221, 329, 1093
— *v.* Rose, 129, 300
— *v.* Rosenberg, 308
— *v.* Rothwell, 286
— *v.* Rouse, 1096
— *v.* Rowlands, 257, 265
— *v.* Rowton, 1089
— *v.* Russel, 243, 244
— *v.* Russell (1805), 6 East, 427...244, 248
— *v.* — (1832), 1 Moo. C. C. 356...281
— *v.* — (1833), 1 Moo. C. C. 377...393
— *v.* — (1842), Car. & M. 541...399
— *v.* — (1854), 23 L. J. M. C. 173...251
— *v.* — [1901] A. C. 446...216, 998
— *v.* — (1905), 93 L. T. 407...174, 176
— *v.* Rutter, 1126
— *v.* Rymer, 454
— *v.* St. Albans (Bishop of), 1179
— *v.* St. George, 316
— *v.* St. George the Martyr, Southwark (Vestry of), 1178
— *v.* St. Luke's, Chelsea (Vestry of), 190
— *v.* Salmon and others, 133, 272, 296, 303
— *v.* Sanders, 384
— *v.* Sandoval, 173
— *v.* Sattler, 138
— *v.* Saunders and Archer, 135, 272
— *v.* Schama, 384, 1106
— *v.* Schlesinger, 199
— *v.* Schmidt, 382
— *v.* Scofield, 109, 145, 255
— *v.* Secretary of State for War, 1175
— *v.* Sedley, 225
— *v.* Selfe (Judge), 1339
— *v.* Senior, 268, 294, 311
— *v.* Serné, 122, 278, 281
— *v.* Serva, 1433
— *v.* Seward, 259
— *v.* Sharman (1854), 23 L. J. M. C. 51...386
— *v.* — [1898] 1 Q. B. 578...1040, 1180
— *v.* Sheean, 328, 1096
— *v.* Shephard, 307
— *v.* Shepherd, 268, 292
— *v.* Sherwood, 285
— *v.* Shipley, 155
— *v.* Shipley P. C., 250
— *v.* Sidlow, 1123
— *v.* Sidney, Algernon, 148
— *v.* Silverlock, 1093
— *v.* Simmonite, 1083
— *v.* Simons, 1098
— *v.* Simpson, 286
— *v.* Skeen, 1072
— *v.* Sleep, 308
— *v.* Smith (1820), R. & R. 417...393
— *v.* — (1852), 2 Den. C. C. 449...345
— *v.* — (1855), 24 L. J. M. C. 135...382
— *v.* — (1858), Dearsl. & B. 553...1355
— *v.* — (1865), 4 F. & F. 1099...1367
— *v.* — (1865), L. & C. 607...268, 292
R. *v.* Smith (1866), 4 F. & F. 1066...285
— *v.* — (1870), L. R. 1 C. C. R. 266...75
— *v.* — (1897), 18 Cox, 470...381
— *v.* — [1909] 2 K. B. 756...1128
— *v.* — [1910] 1 K. B. 17...73
— *v.* — (1915), 84 L. J. K. B. 2153...1088, 1096
— *v.* — [1918] 2 K. B. 415...384
— *v.* Smithies, 1098
— *v.* Solomons, 362
— *v.* Sourton (Inhabitants of), 1099
— *v.* S. E. Ry. Co., 1177, 1178
— *v.* Southampton (Commissioners of), 1178
— *v.* Southport Corporation, 250
— *v.* Speed, 368
— *v.* Spencer, 296
— *v.* Spragg, 258
— *v.* Stafford Prison (Governor), 1072, 1386
— *v.* Stallion, 399
— *v.* Stedman, 286
— *v.* Stephens, 130, 242, 492
— *v.* Stephenson, 205, 246
— *v.* Stepney Borough Council, 1178
— *v.* Stevenson (1759), 19 St. Tr. 846...286
— *v.* — (1862), 3 F. & F. 106...289
— *v.* Stewart, 1178
— *v.* Stoddart, 247
— *v.* Stoke Fenton Gas Co., 248
— *v.* Stowell, 204
— *v.* Strahan, 1072
— *v.* Streeter, 1355
— *v.* Stride and Millard, 341
— *v.* Stubbs, 1100
— *v.* Sullivan, 290
— *v.* — and others, 158, 162, 202
— *v.* Sunderland (Justices of), 1180
— *v.* Surrey (Justices of), 1180, 1181
— *v.* — County Court (Judge of), 203, 1341
— *v.* Swallow, 394
— *v.* Swenson and Caba, 331
— *v.* Swindall and Osborne, 133, 267, 272
— *v.* Symondson, 299
— *v.* Tanks, 1073
— *v.* Tate, 1078 1100
— *v.* Taylor (1859), 1 F. & F. 511...111
— *v.* — (1869), L. R. 1 C. C. R. 194...321
— *v.* — [1911] 1 K. B. 674...356
— *v.* — [1915] 2 K. B. 709...1123
— *v.* Thistlewood, 147
— Thomas *v.* (1874), L. R. 10 Q.B. 31...1183
— *v.* Thomas (1815), 4 M. & S. 442...1181
— *v.* — (1837), 7 C. & P. 817...1385
— *v.* — (1869), 11 Cox, 535...117
— Thompson *v.*, [1918] A. C. 221 ... 999, 1088
— *v.* Thompson (1825), 1 Moo. C. C. 78...356
— *v.* — (1862), 32 L. J. M. C. 53...343
— *v.* Thurborn, 353, 354
— *v.* Tibbits and Windust, 204
— *v.* Tindall, 248
— *v.* Tissington, 327, 1089

R. Tobin *v.*, 1183
— *v.* Tolson, 115, 118, 217
— *v.* Tomlinson, 181
— *v.* Tonks, 310, 1073, 1084
— *v.* Topham, 176
— *v.* Torpey, 1355
— *v.* Toshack, 386
— *v.* Towers, 267
— *v.* Townley, 341
— *v.* Trafford, 594
— *v.* Train, 243, 248
— *v.* Treasury (Lords Commissioners of), 1176
— *v.* Truelove, 229
— *v.* Turner (1811), 13 East, 228...257, 628
— *v.* — (1839), 8 C. & P. 755...308
— *v.* — [1910] 1 K. B. 346...1063, 1075, 1093, 1122
— *v.* Twiss, 1082, 1088
— *v.* Tyler, 127
— *v.* Tyrell, 330
— *v.* United Kingdom Telegraph Co., 10, 243
— *v.* Van Butchell, 304
— *v.* Vantandillo, 245
— *v.* Venn, 79
— *v.* Vestry of St. George the Martyr, Southwark, 1178
— *v.* — St. Luke's, Chelsea, 190
— *v.* Villensky, 382
— *v.* Vincent, 16, 160
— *v.* Voisin, 1088
— *v.* Vreones, 194
— *v.* Waite, 329
— *v.* Wakefield (Mayor, &c., of), 250
— *v.* Wall (1802), 28 St. Tr. 51...271
— *v.* — (1907), 21 Cox, 401...260
— *v.* Waller, 1063, 1075
— *v.* Walne, 367
— *v.* Walsh, 356
— *v.* Walter, 176, 179
— *v.* Walters, 270
— *v.* Wann, 1125
— *v.* Warburton, 258
— *v.* Ward (1872), L. R. 1 C. C. R. 356...124, 321, 403
— *v.* — [1915] 3 K. B. 696...396
— *v.* Warren, 1095
— *v.* Wartnaby, 1181
— *v.* Watkins, 1117
— *v.* Watson, 383
— *v.* Watts (1704), 1 Salk. 357...500
— *v.* — (1798), 2 Esp. 675...251
— *v.* — (1850), 2 Den. C. C. 14...361
— *v.* — (1854), Dearsl. 326...37
— *v.* Weaver, 1127
— *v.* Webb, 304
— *v.* Webster (1789), 3 T. R. 388...1069
— *v.* — (1885), 16 Q. B. D. 134...330
— *v.* Welsh, 285
— *v.* West (1848), 2 C. & K. 784...270
— *v.* — (1854), Dearsl. 402...355
— *v.* — [1898] 1 Q. B. 174...1047
— *v.* West Riding Justices, 224
— *v.* Westfall, 1096
— *v.* Wharton, 1355
— *v.* Wheatland, 200
R. *v.* Wheatly, 106, 375
— *v.* Wheeler, 197, 1078
— *v.* Whitaker, 191, 258
— *v.* Whitchurch, 225
— *v.* White (1871), L. R. 1 C. C. R. 311...312
— *v.* — [1910] 2 K. B. 124...1083
— *v.* Whiteley, 288
— *v.* Whitmarsh, 281
— *v.* Wiley, 382
— *v.* Wilkes, 62, 477
— *v.* Wilkinson, 356
— *v.* Williams (1620), 2 Rolle, R. 88...149
— *v.* — (1711), 10 Mod. 335...1355
— *v.* — (1871), 11 Cox, 684...309
— *v.* — (1884), 9 App. Cas. 418...251, 493, 496, 513
— *v.* — [1893] 1 Q. B. 320...329, 1083
— *v.* Williamson, 304
— *v.* Wilson (1835), 3 A. & E. 817...12, 964
— *v.* — (1879), 5 Q. B. D. 28...1369, 1400
— *v.* Wood, 210
— *v.* Woodcock, 1092
— *v.* Woodhall, 334
— *v.* Woodhouse, 1180
— *v.* Woodland (Inhabitants of), 73
— *v.* Woolcock, 166
— *v.* Worcestershire (Justices of), 1176
— *v.* Wright, 535
— *v.* Wyatt, 369, 1088
— *v.* Yates, 1100
— *v.* Young, 326
— *v.* Young and Webber, 282
— *v.* Zulueta, 335
R. Leslie *v.* Shiell, 1374
Race *v.* Ward, 26, 79, 576, 581
Radam & Co. *v.* Leather, 1038
Radcliffe *v.* Bewes, *In re* Radcliffe, 899
Raffles *v.* Wichelhaus, 726
Raleigh *v.* Goschen, 1183, 1427, 1428
Rambert *v.* Cohen, 752
Ramloll Thackoorseydass *v.* Soojumnull Dhondmull, 735
Ramsden *v.* Dyson, 579
— *v.* Lupton, 732
— and Carr *v.* Chessum, 947
Ramsgate Hotel Co. *v.* Montefiore, 685
Ramuz *v.* Crowe, 834
— *v.* Southend Local Board, 26
Rand *v.* Vaughan, 893
Randall *v.* Newson, 794, 1309
Rangeley *v.* Midland Ry. Co., 567
Rankin *v.* Potter, 415
Rann *v.* Hughes, 700
Raphael *v.* Bank of England, 832
Rapid Road Transit Co., Ltd., *In re*, 854
Rapson *v.* Cubitt, 493
Rasbotham *v.* Shropshire, &c., Canal Co., 1245
Rassam *v.* Budge, 526
Ratcliffe *v.* Evans, 417, 499, 540, 545, 1291, 1293
Raulin *v.* Fischer, 955
Ravenga *v.* Mackintosh, 549
Rawlings, *Ex parte*, 772
Rawlinson *v.* Moss, 1455

Rawlinson *v.* Scholes, 1100
Rawlyns *v.* Vandyke, 1362
Rayner *v.* Rederiaktiebolaget Condor, 1315
Rayson *v.* South London Tramways Co., 1418
Rea *v.* Sheward, 964
Read *v.* Anderson, 736
— *v.* Brown, 774, 1036
— *v.* Coker, 471
— *v.* Edwards, 509
— *v.* Friendly Society, 627
— *v.* Legard, 1362, 1364, 1387, 1388
— *v.* Price, 666
Reading *v.* School Board for London, 773
Real and Personal Advance Co. *v.* Phalempin, 845
Red Man's Syndicate *v.* Associated Newspapers, 1290
Reddaway *v.* Banham, 426, 614, 615, 618, 619
Rederi Aktiebolaget Nordstjernan *v.* Salvesen, 847, 911
Redford *v.* Birley, 162
Redgrave *v.* Hurd, 555, 722
Reece *v.* Taylor, 962
Reed's Case, 360
Reedie *v.* L. & N. W. Ry. Co., 490, 493, 502, 510
Rees *v.* De Bernardy, 734, 782
— *v.* Williams, 1028
Reese River Mining Co. *v.* Smith, 720, 722
Reeve *v.* Conyngham (Marquis of), 1362
Reeves *v.* Hearne, 693
Reichel *v.* Magrath, 1199
Reid *v.* Explosives Co., 863
— *v.* Hollinshead, 856
— *v.* Macbeth, 796
— *v.* Teakle, 1361
—, Hewitt & Co. *v.* Joseph, 1279
Reigate *v.* Union, &c., Co., 848
Reimers *v.* Druce, 956
Rein *v.* Stein, 970, 1002, 1260
Remmington *v.* Scoles, 1199
Rendall *v.* Hayward, 1334
Rendell *v.* Roman, 875
Reneaux *v.* Teakle, 1361
Republic of Bolivia, &c., *In re*, 663
— *v.* Indemnity, &c., Assurance Co., 915
— Costa Rica *v.* Erlanger, 72
— Peru *v.* Dreyfus, 1432
Reuter *v.* Sala, 749
Reversion, &c., Co. *v.* Maison Cosway, 846
Revis *v.* Smith, 553
Rew's Case, 271
Reynell *v.* Lewis, 1422
— *v.* Sprye, 729
Reynolds, *Ex parte*, 1098
— *v.* Accidental Insurance Co., 941
— *v.* Edwards, 575
Rhodes, *In re*, 950, 1387
— *v.* Dawson, 1408
— *v.* Moules, 1456
Rhymney Ry. Co. *v.* Rhymney Iron Co., 436
Ricardo *v.* Garcias, 955
Rice *v.* Baxendale, 1310
Rich *v.* Basterfield, 510
Richards *v.* L. B. & S. C. Ry. Co., 643, 658
— *v.* McBride, 70
— *v.* West Middlesex Waterworks Co., 492
Richardson *v.* Du Bois, 1365, 1387
— *v.* Langridge, 878
— *v.* Mellish, 742
— *v.* N. E. Ry. Co., 645, 648, 650
— *v.* Rowntree, 647, 654, 688
— *v.* Silvester, 427, 545
— *v.* Walker, 79
— *v.* Willis, 432, 1131
—, Spence & Co. *v.* Rowntree, 647, 654, 688
Riche *v.* Ashbury Carriage Co., 843, 1419
Richmond *v.* Smith, 641
Ricket *v.* Metropolitan Ry. Co., 412
Ricketts *v.* The East and West India Docks, &c., Ry. Co., 487
Ridgway *v.* Hungerford Market Co., 864
— *v.* Wharton, 699
Riding *v.* Smith, 545, 1293, 1356
Rigby *v.* Hewitt, 498
Rigge *v.* Burbidge, 1319
Riley *v.* Horne, 645
Rimmer *v.* Rimmer, 963
Ripon R. D. C. *v.* Armitage, 503
Ritchie *v.* Smith, 732
River Steamer Co., *In re*, 1140
River Wear Commissioners *v.* Adamson, 407, 497
Rivers (Lord) *v.* Adams, 84
Roach *v.* Garvan, 201
Robarts *v.* Tucker, 828
Robert Besnard Co. *v.* Murton, 937
— Marys's Case, 561, 587
Roberts *v.* Brennan, 1019
— *v.* Crowe, 948
— *v.* Gray, 1371
— *v.* Havelock, 746
— *v.* Holland, 1256
— *v.* Rose, 966
— *v.* Security Co., Ltd., 946
— & Co. *v.* Marsh, 811
Robertson *v.* Fleming, 486
— *v.* Struth, 955
Robin *v.* Steward, 413
Robins *v.* Bridge, 1454
— *v.* Gray, 641
Robinson *v.* Balmain New Ferry Co., 475
— *v.* Bland, 735
— *v.* Currey, 954
— *v.* Davison, 755
— *v.* Fenner, 956
— *v.* Harman, 1306
— *v.* Heuer, 740
— *v.* Hofman, 887
— *v.* Mollett, 88, 680, 849
— *v.* Read, 755
— *v.* Robinson, 1358
— *v.* Rutter, 636
— *v.* Walter, 892
— *v.* Workington Corporation, 502
— & Co. (William) *v.* Heuer, 740
Robson *v.* Smith, 780
Rochdale Canal Co. *v.* King, 414

Rochefoucauld *v.* Boustead, 1009, 1210
Rochester (Mayor of) *v.* R., 1177
Rodgers *v.* Parker, 415
Rodick *v.* Gandell, 777, 778
Rodwell *v.* Phillips, 707
Roe *v.* Rawlings, 1102
— d. Durant *v.* Doe, 901
Roff *v.* British, &c., Chemical Co., 518
Roffey *v.* Greenwell, 812
Rogers *v.* Brenton, 79
— *v.* Dutt, 418
— *v.* Ingham, 727
— *v.* Lambert, 635
— *v.* Macnamara, 459
— *v.* Maddocks, 740
— *v.* Taylor, 85
— *v.* Whiteley, 829
— , Eungblut & Co. *v.* Martin, 892
Rolls *v.* Isaacs, 603
— *v.* Pearce, 829
Rolt *v.* White, 787
Roney & Co., *In re*, 1452
Rooke *v.* Dawson, 687
— *v.* Kensington (Lord), 1163
Roper *v.* Johnson, 807
— *v.* Knott, 403
Ropeways, Ltd. *v.* Hoyle, 741
Roscorla *v.* Thomas, 691
Rose, *In re*, 855
— *v.* Buckett, 437
— *v.* Kempthorne, 318
— *v.* Savory, 948
Rosenbaum *v.* Belson, 846
Rosewarne *v.* Billing, 730, 736
Ross *v.* Hill, 643
— *v.* London County, &c., Bank, 828
— *v.* Norman, 475
Rossiter *v.* Miller, 683, 697, 699
Roth *v.* Tayson, 1311
Rothes (Countess of) *v.* Kirkcaldy, &c., Commissioners, 71
Rothschild *v.* Brookman, 849
Roundwood Colliery Co., *In re*, 893
Rouse *v.* Bradford Banking Co., Ltd., 822
Rousillon *v.* Rousillon, 741, 956
Roux *v.* Salvador, 936
Rowbotham *v.* Wilson, 410, 588
Rowley *v.* L. & N. W. Ry. Co., 1302
Roxburghe *v.* Cox, 787
Royal Aquarium, &c., Society *v.* Parkinson, 532
— Baking Powder Co. *v.* Wright, 540, 1159
— Exchange Ass. Corp. *v.* Vega, 1226
— Mail Steam Packet Co. *v.* George & Branday, 575
Royle *v.* Busby & Son, 1454
Ruben *v.* Great Fingall Consolidated, 722, 1417
Rumball *v.* Metropolitan Bank, 771, 838
Rundle *v.* Little, 1281
Ruoff *v.* Long & Co., 494
Russel *v.* McClymont, 862
Russell *v.* Amalgamated Society, &c., 1424
— *v.* Phillips, 813
— *v.* Russell, 1041
— *v.* Watts, 568
Ruther *v.* Harris, 71
Rutter *v.* Everett, 784
Ruttinger *v.* Temple, 694
Ryall *v.* Kidwell & Son, 882
Ryan *v.* Mutual Tontine Association, 1168, 1169
Ryder *v.* Wombwell, 1372
Rylands *v.* Fletcher, 429, 504, 508, 509

S.

S. PEARSON & SON *v.* Dublin Corp., 722, 1418
Saccharin Corporation *v.* Wild, 1260
Sackville-West *v.* Attorney-General, 1253
Sadler *v.* G. W. Ry. Co., 1148
— *v.* Staffs., &c., Tramways Co., 488
— *v.* Whiteman, 731
Saffery *v.* Mayer, 736
Saffron Walden Building Society *v.* Rayner, 1450
Sage *v.* Eichholz, 365
St. Helen's Smelting Co. *v.* Tipping, 506
St. John's Case, 157
St. Nazaire Co., *In re*, 1163
St. Paul, The, 1331
Salaman *v.* Secretary of State for India, 532, 1427
Salford (Mayor of) *v.* Lever, 849
Salisbury (Marquis of) *v.* Gladstone, 85
Salt *v.* Cooper, 1165
Salt Union, Ltd. *v.* Brunner, Mond & Co., 409, 424
Salton *v.* New Beeston Cycle Co., 1365
Salvesen & Co. *v.* Rederi Aktiebolaget Nordstjernan, 847, 911
Salvin *v.* James, 929
Sampson *v.* Hoddinott, 591
Samuel *v.* Newbold, 718
Sanders *v.* Hamilton, 1323
— *v.* Maclean, 914
— *v.* St. Neots Union, 672, 748
— *v.* Sanders, 1331
— *v.* Stuart, 1283, 1290, 1294, 1297
Sanders-Clark *v.* Grosvenor Mansions, 14
Sandes *v.* Wildsmith, 1147
Sandill *v.* Franklin, 901
Sandow, Ltd.'s Application, *In re*, 614
Sands *v.* Child, 130, 623, 1426
Sanitary Commissioners of Gibraltar *v.* Orfila, 513
Santos *v.* Illidge, 956
Sapwell *v.* Bass, 1297
Saqui *v.* Stearns, 945
Sarch *v.* Blackburn, 509
Sarl *v.* Bourdillon, 712
Sarson *v.* Roberts, 907
Saunders *v.* Edwards, 1138
— *v.* Holborn District Board of Works, 436, 502
Saunderson *v.* Jackson, 712
Savery *v.* King, 719
Savile *v.* Roberts, 626
Saxby *v.* Easterbrook, 521, 1160
— *v.* Fulton, 736
— *v.* Manchester, Sheffield, &c., Ry. Co., 511
Saxlehner *v.* Apollinaris Co., 620

Sayre *v.* Earl of Rochford, 477
Scaife *v.* Farrant, 638
— *v.* Kemp & Co., 1244, 1320
Scarf *v.* Jardine, 759
Scarpetta *v.* Lowenfeld, 956
Schibsby *v.* Westenholz, 956, 957, 958
Schmaltz *v.* Avery, 850
Schneider *v.* Norris, 700
Scholfield *v.* Earl of Londesborough, 821
Schrœder *v.* Central Bank, 774, 777
Schulze *v.* G. E. Ry. Co., 1311
Schuster *v.* McKellar, 493
Schwann *v.* Cotton, 568
Schwinge *v.* Dowell, 586
Scotson *v.* Pegg, 690
Scott *v.* Avery, 1132
— *v.* Baring, 1052
— *v.* Brown, 736, 738
— *v.* Coulson, 726, 757
— *v.* Lord Hastings, 783
— *v.* Morley, 1204, 1207, 1358, 1365
— *v.* Pape, 571
— *v.* Pearson, 944
— *v.* Pilliner, 100
— *v.* Sampson, 1114, 1320
— *v.* Sebright, 717
— *v.* Seymour (Lord), 1001
— *v.* Shepherd, 416, 473, 494
— *v.* Stanford, 610
— *v.* Stansfield, 419, 531
Scottish Shore Line *v.* London, &c., Co., 932
Scratton *v.* Brown, 15
Sea Insurance Co. *v.* Carr, 1004
Seaman *v.* Burley, 43
— *v.* Netherclift, 532
Searle *v.* Laverick, 638
Seath *v.* Moore, 796
Seaton *v.* Benedict, 1360
Seddon *v.* Bank of Bolton, 574
Seear *v.* Lawson, 1214
Selby *v.* Robinson, 84
Seldon *v.* Wilde, 1457
Sellers *v.* Dickinson, 602
Semayne's Case, 426, 894
Serff *v.* Acton Local Board, 575
Serle *v.* Fardell, 1009
Seroka *v.* Kattenburg, 438, 1358
Serrao *v.* Noel, 1220, 1278, 1323
Severance *v.* Civil Service Supply Association, 1357
Sewell *v.* National Telephone Co., 479
Seymour *v.* Bridge, 89
— *v.* Pickett, 753
Seymour and Michael Davitt, *Ex parte*, 154
Shackell *v.* Rosier, 623, 730
Shadwell *v.* Shadwell, 690
Shardlow *v.* Cotterell, 698, 699
Sharman *v.* Brandt, 713, 714
— *v.* Sanders, 660
Sharp *v.* Fowle, 464
— *v.* Powell, 416
— *v.* Wakefield, 62
Sharpe *v.* Brice, 1314
— & Co. *v.* Nosawa & Co., 807
Sharpe's Trade Mark, *In re*, 612
Sharpness New Docks *v.* Att.-Gen., 69
Sharrod *v.* L. & N. W. Ry. Co., 487, 492
Shaw, *In re*, 1406
— *v.* Chairitie, 474
— *v.* Crompton, 1135
— *v.* Gould, 219
— *v.* Holland, 815
— *v.* Jersey (Earl of), 1159
— *v.* Lomas, 900
— *v.* Stenton, 881
— Symmonds, 635
Sheehan *v.* G. E. Ry. Co., 601
Shelbourne & Co. *v.* Law, &c., Insurance Corp., 1295
Shelfer *v.* City of London Electric Light Co., 507, 1158
Shellard, *Ex parte*, 783
Shelton *v.* Springett, 693, 694
Shephard, *In re*, 1326
Shepheard *v.* Bray, 624, 1414
— *v.* Whitaker, 517
Shepherd *v.* Johnson, 1311
— *v.* Robinson, 1442
Sheringham U. D. C. *v.* Halsey, 10
Sherras *v.* De Rutzen, 119, 122
Sherry, *In re*, 754
Sheward, *In re*, 776
Shiells *v.* Scottish Assurance Corporation, 942
Shilling *v.* Accidental Death Insurance Co., 924, 940, 942
Shillito *v.* Thompson, 41, 97, 106, 504
Shipway *v.* Broadwood, 734, 849
Short *v.* Kalloway, 1299
— *v.* Stone, 750
Shuttleworth *v.* Le Fleming, 577
Siddons *v.* Short, 1159
Sievewright *v.* Archibald, 713, 715
Simmons, *Ex parte*, 1012
— *v.* Heath Laundry Co., 871
— *v.* Heseltine, 951
— *v.* London Joint Stock Bank, 839
— *v.* Mitchell, 522
— *v.* Norton, 885
— *v.* Rose, 1456
Simms *v.* Lilleshall Colliery Co., 870
Simons *v.* Patchett, 850
Simpson *v.* Accidental Death Insurance Co., 937
— *v.* Crippin, 761
— *v.* Eggington, 843
— *v.* Fogo, 956
— *v.* Hartopp, 891
— *v.* Lamb, 782
— *v.* L. & N. W. Ry. Co., 1295, 1308, 1310
— *v.* Teignmouth, &c., Co., 73
— *v.* Wells, 78, 585
Sims *v.* Brutton, 1456
— *v.* Landray, 713, 853
— *v.* Marryat, 640
— & Co. *v.* Midland Ry. Co., 654, 655
Sinclair *v.* Bowles, 746
— *v.* Brougham, 950
— *v.* Maritime Passengers' Assurance Co., 939
"Singer" Machine Manufacturers *v.* Wilson, 412, 617

Singer Manufacturing Co. *v.* L. & S. W. Ry. Co., 653, 1026
— Manufacturing Co. *v.* Loog, 619, 620
Singh *v.* Pattuk, 414, 593, 594
Singleton *v.* Ellison, 224
— *v.* Knight, 859
Sirdar Gurdyal Singh *v.* Rajah of Faridkote, 956, 957
Six Carpenters' Case, 454
Skinner *v.* City of London Insurance Corp., 433, 1295
— *v.* East India Co., 1021
— *v.* Gunton, 256, 475, 625
— *v.* Kitch, 627
— *v.* Northallerton County Ct. Judge, 1032
— & Co. *v.* Shew & Co., 1292
Slater *v.* Parker, 1361
Slim *v.* G. N. Ry. Co., 651
Smallwood *v.* Sheppards, 705
Smart *v.* Flood, 1166
— *v.* Sandars, 852
Smee *v.* Smee, 1380
Smidt *v.* Tiden, 726
Smith *v.* Accident Insurance Co., 941
— *v.* Allen, *In re* Harrison, 1392
— *v.* Bailey, 493
— *v.* Baker, 457, 866, 867, 1343
— *v.* Barnham, 121
— *v.* Buskell, 1230
— *v.* Chadwick, 555, 725
— *v.* Chorley R. C., 1177
— *v.* Clinton, 730
— *v.* Cook, 28
— *v.* Darby, 410
— *v.* Edwardes, 1203
— *v.* Feverell, 587
— *v.* Giddy, 967
— *v.* Gold Coast Co., 708, 862
— *v.* Green, 1295, 1302, 1317
— *v.* Hughes, 721, 726
— *v.* Kenrick, 407, 411, 594
— *v.* Kerr, 1438
— *v.* King, 1376
— *v.* Kynnersley, 73
— *v.* Land, &c., Corporation, 722, 724
— *v.* L. & N. W. Ry. Co., 651
— *v.* L. & S. W. Ry. Co., 488
— *v.* Marrable, 907
— *v.* Mawhood, 732
— *v.* Mills, 884
— *v.* Neale, 698, 699, 709
— *v.* Nicholls, 955
— *v.* Prosser, 817, 1110
— *v.* Scott, 1321
— *v.* Selwyn, 105, 423, 1199
— *v.* Spooner, 543
— *v.* Tebbitt, 1380
— *v.* Troup, 1448
— *v.* Webster, 1450
— *v.* Wilson, 87
— and Belfast Corporation, *In re*, 1295
— Hartogg, *In re*, 888
— Sons *v.* L. & N. W. Ry. Co., 651
— Wife *v.* Selwyn, 105, 423, 1199
Smith (W. H.) & Son *v.* Clinton, 730
Smithies *v.* Bridge, 504
— *v.* National Association, &c., 73
Smout *v.* Ilbery, 1363—1365
Smyth, *Ex parte*, 1179
Sneesby *v.* Lanc. & Yorks. Ry. Co., 1297
Snow *v.* Whitehead, 410, 594
Soames *v.* Spencer, 843
Soanes *v.* L. & S. W. Ry. Co., 657
Société Général de Paris *v.* Tramways Union Co., 844
— *v.* Walker, 785
— Maritime *v.* Venus Steam Shipping Co., 1163
Solicitor, *In re* A, 1445, 1454, 1457, 1459
Solomon *v.* The Vintners' Co., 590
Solomons *v.* Bank of England, 833
Soltau *v.* De Held, 243, 505, 506
Soltykoff, *In re*, 837, 1374, 1400
Some's Case, 246
Somerset (Duke of), *In re*, 1353
— *v.* Cookson, 1169
Somerville *v.* Hawkins, 538, 539
Sommerville *v.* Mirehouse, 482
Souch *v.* Strawbridge, 708
South African Republic *v.* La Compagnie, &c., 663, 1432
— Territories *v.* Wallington, 1168, 1306
South American, &c., Co., *In re*, *Ex parte* Bank of England, 669
S. E. Ry. Co. *v.* Ry. Commissioners, 70, 653, 1026
South Hetton Coal Co. *v.* N. E. News Association, 527, 528, 1417
South of England Dairies, Ltd. *v.* Baker, 896
— Ireland Colliery Co. *v.* Waddle, 672, 1420
South Wales Atlantic S.S. Co., *In re*, 1411
— Miners' Federation *v.* Glamorgan Coal Co., 262, 541, 563, 627, 1423
Southey *v.* Sherwood, 606
Southport Tramways Co. *v.* Gandy, 1259, 1278, 1304
Southwell *v.* Scotter, 781
Soward *v.* Leggatt, 884
Sowerby *v.* Coleman, 79
Spartali *v.* Benecke, 796
Spawforth *v.* Alexander, 752
Speake *v.* Hughes, 416, 1298
Speck *v.* Phillips, 864
Spedding *v.* Fitzpatrick, 1219
— *v.* Nevell, 1300
Spencer *v.* Harding, 687
— *v.* Jones, 1332
Spencer's Case, 675, 770, 881, 896
Speyer *v.* Commissioners, &c., 830
Spice *v.* Bacon, 642
Spiers & Pond *v.* Bennett, 504
Spill *v.* Maule, 535, 538
Spokes *v.* Grosvenor Hotel, 1098
Spong *v.* Wright, 1142
Spoor *v.* Green, 590, 1137
Springhead Spinning Co. *v.* Riley, 562
Squib *v.* Wyn, 772

Stacey *v.* Hill, 898
— *v.* Wallis, 823
Staffs. Canal Navigation *v.* Bradley, 570, 577
Stamford Banking Co. *v.* Smith, 1141
Stanley *v.* English Fibres Industries, 783
— *v.* Hayes, 882
— *v.* Powell, 445, 452, 471, 472, 496
— *v.* White, 1088
Stannard *v.* Vestry of St. Giles, Camberwell, 1157
Stanton *v.* Percival, 1108
— *v.* Richardson, 912
Starkey *v.* Bank of England, 853
Stathatos *v.* Stathatos, 218, 1353
Stavely *v.* Allcock, 889
Steamship Co. "Norden" *v.* Dempsey, 88
Stearn *v.* Prentice Bros., 509
Steeden *v.* Walden, 1377
Steeds *v.* Steeds, 438, 764
Steel *v.* Cammell, Laird & Co., 944
Steele *v.* Brannan, 114, 229, 535
Steers *v.* Rogers, 601
Stein *v.* Pope, 898
Stephens *v.* Dudbridge Ironworks Co., 1374, 1375
— *v.* L. and S. W. Ry. Co., 650
Stephenson *v.* Garnett, 1342
Stevens *v.* Bagwell, 782
— *v.* Jeacocke, 436
— *v.* Midland Ry. Co., 550, 1418
— *v.* Myers, 317
— *v.* Sampson, 530
Stevenson *v.* Maclean, 683
— *v.* Newnham, 262, 423
Steward *v.* Young, 543
Stewart *v.* Casey, 691
— *v.* Kennedy, 725, 1168
— *v.* West India S.S. Co., 88
— & Son, Ltd. *v.* Longhurst, 872
Stilk *v.* Myrick, 690
Stimpson *v.* Wood, 495
Stobart *v.* Dryden, 1092
Stockdale *v.* Hansard, 531
Stocks *v.* Dobson, 787
— *v.* Wilson, 1371
Stoddart *v.* Sagar, 247
Stoessiger *v.* S. E. Ry. Co., 649
Stokell *v.* Heywood, 781, 937
Stokes *v.* Prance, 1456
Stollmeyer *v.* Trinidad, &c., Co., 591
Stone *v.* Lidderdale, 782
Stoneham *v.* Ocean Accident Assurance Co., 942
Story *v.* Ashton, 491
Stowel *v.* Lord Zouch, 70
Straton *v.* Rastall, 951
Strauss *v.* County Hotel Co., 641
— *v.* Francis, 528, 1442
Street *v.* Blay, 1319
Stribblehill *v.* Brett, 733
Strickland *v.* Hayes, 97
— *v.* Turner, 726, 927
— *v.* Williams, 1317
Stroud *v.* Lawson, 1416
Stroughill *v.* Buck, 677
Strousberg *v.* Republic of Costa Rica, 1432
Stroyan *v.* Knowles, 588
Stuart *v.* Bell, 534
— *v.* Crawley, 645
Stubbs *v.* Marsh, 1166
Sturges *v.* Bridgman, 513
Sturla *v.* Freccia, 389, 1101
Suarez, *In re*, 1432
Suffell *v.* Bank of England, 763, 836
Sugden *v.* Lord St. Leonards, 1104
Sullivan *v.* Earl Spencer, 1427
Summerson, *In re*, 1266
Sumpter *v.* Hedges, 746
Sussex Peerage Case, 70, 1093
Sutton *v.* Clarke, 623
— *v.* Grey, 703, 853
— *v.* Moody, 467
Sutton's Trusts, *In re*, 773
Swan *v.* North British Australasian Co. 678, 816
Swansborough *v.* Coventry, 568
Sweeney *v.* Coote, 265, 627, 631
Sweeting, *In re*, 1445
— *v.* Turner, 796
Swift *v.* Jewsbury, 555, 704
Swindell *v.* Bulkeley, 1397
Swinfen *v.* Lord Chelmsford, 854, 1442
— *v.* Swinfen, 1443
Swire *v.* Francis, 558
— *v.* Leach, 891
Swyny *v.* Harland, 1454
Sydney (Municipal Council of) *v.* Bourke, 502
Sykes *v.* Dunbar, 1099
— *v.* Giles, 714, 854
— *v.* Howarth, 602
— *v.* Sykes, 616
Symon & Co. *v.* Palmer's Stores, 1206
Symons *v.* Leaker, 71, 574
— *v.* Mulkern, 838
Synge *v.* Synge, 862, 1132, 1288
Syred *v.* Carruthers, 639

T.

Taaffe *v.* Downes, 418, 419
Taddy *v.* Sterious, 794
Tadman *v.* Henman, 876
Taff Vale Ry. Co. *v.* Amalgamated Society of Railway Servants, 1423
Tailby *v.* Official Receiver, 777, 781
Tait *v.* Beggs, 1321, 1333
Talbot *v.* Von Boris, 815
Talley *v.* G. W. Ry. Co., 657
Tallis *v.* Tallis, 741
Tamplin *v.* James, 726, 1170
Tancred *v.* Allgood, 460
— *v.* Delagoa Bay Ry. Co., 778
— *v.* Leyland, 553, 894
Tandy *v.* Earl of Westmoreland, 1427
Taner *v.* Ivie, 1377
Tangye *v.* Scott, 604
Tanham *v.* Nicholson, 901
Tanner *v.* Smart, 1141, 1142
Tapling *v.* Jones, 572
Tapp *v.* Jones, 1329
Tarleton *v.* McGawley, 265, 424
Tarrabochia *v.* Hickie, 912
Tarry *v.* Ashton, 485

Tatam *v.* Haslar, 815, 833
— *v.* Reeve, 736
Tattersall *v.* National Steamship Co., 912
Taunton *v.* Costar, 964
Taylor, *In re*, 29
— *v.* Best, 1432
— *v.* Bowers, 730
— *v.* Brewer, 862
— *v.* Caldwell, 755, 757
— *v.* Chester, 730, 741
— *v.* Goodwin, 253
— *v.* G. E. Ry. Co., 710, 715
— *v.* Hollard, 1136, 1140
— *v.* Laird, 686
— *v.* Lendey, 951
— *v.* Manchester, &c., Ry. Co., 430
— *v.* Metropolitan Ry. Co., 727
— *v.* Nesfield, 483
— *v.* Smith, 710
— *v.* Witham, 1111
Teale *v.* Harris, 97
Temperton *v.* Russell, 562, 628
Temple Bar, The, 1253
Tendring Hundred Waterworks Co. *v.* Jones, 854
Tennant, *Ex parte*, 855
Tennent *v.* City of Glasgow Bank, 559
Terrell *v.* Murray, 885
Terry *v.* Sweeting, *In re* Duncan, 437, 1395
Tetley *v.* Wanless, 1308
Thacker *v.* Hardy, 737, 848
Thackray *v.* Blackett, 835
Thames, &c., Insurance Co. *v.* "Gunford" Ship Co., 932
Tharsis Sulphur Co. *v.* Loftus, 420
Thayre *v.* L. B. & S. C. Ry. Co., 864
Theobald *v.* Railway Passengers' Assurance Co., 1295
Thetford (Mayor of) *v.* Tyler, 907
Theyer *v.* Purnell, 451
Thomas *v.* Bradbury, Agnew & Co., 408, 521, 530
— *v.* Hudson, 481
— *v.* Moore, 625, 1147
— *v.* Quartermaine, 488, 867
— *v.* R., 1183
— *v.* Sutters, 97
— *v.* Thomas, 688, 690
— *v.* Tyne, &c., Assoc., 935
— *v.* Williams, 865
— Crook's Trade Mark, *In re*, 614
— Gabriel & Sons *v.* Churchill & Sim, 853
Thomlinson's Case, 1174
Thompson, *In re*, 1184
— *v.* Adams, 928
— *v.* Gardiner, 714, 853
— *v.* Goold, 1345
— *v.* Hudson, 1315, 1316
— *v.* Mashiter, 891
— *v.* Montgomery, 426, 618, 619
— *v.* Pettitt, 1301
— *v.* R., 999, 1088
— *v.* Trevanion, 1091
Thomson *v.* Brighton (Mayor, &c., of), 502
— *v.* Clanmorris, Lord, 1140
— *v.* Davenport, 852
Thomson *v.* Weems, 942
Thorn *v.* Mayor, &c., of London, 665
Thorne *v.* Heard, 1450
Thornton *v.* Kempster, 727
Thoroughgood's Case, 678, 726
Thorpe *v.* Brumfitt, 244, 511
Threlfall *v.* Wilson, 1357
Thunder *v.* Belcher, 880
Thurn and Taxis (Princess) *v.* Moffitt, 663
Thursby *v.* Eccles, 705
Thwaites *v.* Coulthwaite, 736
— *v.* Wilding, 465, 890
Thynne *v.* Shove, 739
Tichborne *v.* Weir, 1134
Tidman *v.* Ainslie, 526, 1321
Tiedemann & Ledermann Frères, *In re*, 842, 844
Tilbury *v.* Silva, 84
Tildesley *v.* Harper, 1225
Tilley *v.* Bowman, 1405
Tilling *v.* Dick, Kerr & Co., 1139
Timothy *v.* Simpson, 170, 478
Tinkler *v.* Prentice, 888
Tinkley *v.* Tinkley, 1358
Tinson *v.* Wilson, 1016
Tobias, *In re*, 1011
Tobin *v.* R., 1183
Todd *v.* Kellage, 863
Toleman, *In re*, 1393
Tolhurst *v.* Cement Manufacturers, Ltd., 747, 765, 780
Tomkins *v.* Saffery, 89
Tomlinson *v.* Consolidated Credit Corporation, 893
Tonson *v.* Walker, 610
Toomey *v.* Murphy, 1204
Tootell, *Ex parte*, 812
Tooth *v.* Hallett, 787
Topham *v.* Duke of Portland, 840
Toppin *v.* Lomas, 706
Torkington *v.* Magee, 781
Toronto Municipal Corporation *v.* Virgo, 97
Torriano *v.* Young, 885, 886
Townsend *v.* Haworth, 602
— (Lord) *v.* Hughes, 69
Townshend (Lord) *v.* Robins, 1386
Tozeland *v.* West Ham Union, 490
Tozier *v.* Hawkins, 1433
Trade Mark "Bovril," *In re*, 612
Traherne *v.* Gardner, 952
Travers & Sons, Ltd. *v.* Cooper, 638
Trebeck *v.* Croudace, 481
Trego *v.* Hunt, 739
Tregoning *v.* Attenborough, 950
Trelawny *v.* Coleman, 1092
Trenton Insurance Co. *v.* Perrine, 1417
Trew *v.* Ry. Pass. Assurance Co., 939
Trinder *v.* Thames, &c., Insurance Co., 936
Trollope & Sons *v.* London, &c., Federation, 628, 1423
Trotter *v.* Maclean, 1137
Trueman *v.* Hurst, 1367
Truman *v.* L. B. & S. C. Ry. Co., 244, 412, 512, 513
Truro (Corporation of) *v.* Rowe, 586
Truscott *v.* Diamond Rock Boring Co., 884
— *v.* Merchant Taylors Co., 77

Tucker *v.* Linger, 81, 82, 883
Tuff *v.* Warman, 497
Tughan *v.* Craig, 531
Tunnicliffe *v.* West Leigh Colliery Co., 1138, 1278, 1324
Turcan, *In re*, 780
Turnbull *v.* Deval, 1334
Turner, *In re*, 1093
— *v.* Allday, 887
— *v.* Cameron's Coalbrook Co., 448
— *v.* Coates, 489, 501
— *v.* Doe *d.* Bennett, 879, 901, 902
— *v.* Goldsmith, 848
— *v.* G. W. Ry. Co., 1343
— *v.* Green, 1170, 1171
— *v.* Mason, 864
— *v.* Mersey Docks, &c., Board, 1016
— *v.* Meymott, 964
— *v.* Stallibras, 689
— *v.* Walsh, 887, 897, 1257
— *v.* Winter, 601
Turquand *v.* Fearon, 774, 1219
Turton *v.* Benson, 786
— *v.* Turton, 616
Tweddle *v.* Atkinson, 688
Twycross *v.* Grant, 437, 560, 1302, 1398
Twyne's Case, 42
Tyers *v.* Rosedale, &c., Iron Co., 1288
Tyrrell *v.* Painton, 1451
Tyrringham's Case, 461
Tyson *v.* Smith, 76, 79, 80

U.

UDELL *v.* Atherton, 722
Uhde *v.* Warlters, 87
Underwood *v.* Lewis, 1447
— *v.* Underwood, 764
"Uneeda" Trade Mark, *In re*, 612
Ungley *v.* Ungley, 704, 705
Union Insurance Soc. *v.* Wills, 935
— Steamship Co. *v.* Melbourne, &c., Commissioners, 70
United Banking Association, *Ex parte*, 1400
— Mining, &c., Corporation *v.* Becher, 1457
U. S. A. *v.* McRae, 1432
— *v.* Prioleau, 1432
U.S. Steel Products Co. *v.* G. W. Ry. Co., 635
United Telephone Co. *v.* London and Globe Telephone Co., 604
Unity Banking Assoc., *Ex parte*, 1400
Universal Stock Exchange *v.* Strachen, 737
University of London Press, Ltd. *v.* University Tutorial Press, Ltd., 606
Unwin *v.* Clarke, 1288
Upton *v.* Townend, 964
Urquhart *v.* Macpherson, 719
Usill *v.* Hales, 535
Utal *v.* May, 1150, 1280
Uttley *v.* Mitre Publishing Co., 1360

V.

VACHER & SONS *v.* London Society of Compositors, 70, 1424
Vadala *v.* Lawes, 956
Valentini *v.* Canali, 1374, 1377
Vallance *v.* Blagden, 742
Valpy *v.* Gibson, 792
— *v.* Oakeley, 1311
— *v.* St. Leonard's Wharf Co., 878
Vandenburgh *v.* Truax, 416
Vane *v.* Lord Barnard, 886
Van Gelder Co. *v.* Sowerby Bridge Soc., 601
Van Grutten *v.* Trevenen, 901
Vanheath *v.* Turner, 56
Van Praagh *v.* Everidge, 713
Vaspor *v.* Edwards, 968
Vaughan *v.* Hancock, 706
— *v.* Taff Vale Ry. Co., 488, 496, 503
Vaughton *v.* L. & N. W. Ry. Co., 650
Vavasseur *v.* Vavasseur, 1100
Venables *v.* Baring, 838
— *v.* Smith, 492
Vera Cruz, The (No. 2), 67, 68
Verrall, *In re*, 73
Vestry of Bermondsey *v.* Brown, 10
Vezey *v.* Rashleigh, 667, 696, 758, 759, 1094
Vicars *v.* Wilcocks, 415
Victorian Daylesford Syndicate, Ltd. *v.* Dott, 731
— Railway Commissioners *v.* Coultas, 1303, 1310
Vigers *v.* Sanderson, 794
Vinden *v.* Hughes, 814
Vine, *Ex parte*, 437, 1407, 1408
Viney *v.* Bignold, 1132
Vivian *v.* Mersey Docks Board, 513
— *v.* Moat, 900
Vogan *v.* Oulton, 1299
Voisey, *Ex parte*, *In re* Knight, 878
Von Heyden *v.* Neustadt, 602
Von Knoop *v.* Moss, 892

W.

WADDELL *v.* Blockey, 1302, 1308
Wade *v.* Simeon, 689
Wagstaff, *In re*, 1332
Wagstaffe *v.* Bentley, 1229
Wain *v.* Bailey, 835
— *v.* Warlters, 699
Wainford *v.* Heyl, 1358
Wainwright *v.* Bland, 923, 924
Wait *v.* Baker, 798
Waite *v.* Jones, 729
Waithman *v.* Wakefield, 1362
Wake *v.* Hall, 904
— *v.* Harrop, 696, 852
Wakefield *v.* Newbon, 717, 952
Wakelin *v.* L. & S. W. Ry. Co., 497, 1107
Walcot *v.* Walker, 606
Walker, *In re*, 1388
— *v.* Baird, 418, 1427
— *v.* Bradford Old Bank, 774, 775, 783, 784
— *v.* Crystal Palace Football Club, 871

Walker *v.* G. W. Ry. Co., 845
— *v.* Hicks, 1218
— *v.* Horner, 120
— *v.* Nussey, 711
— *v.* Perkins, 741
— *v.* Stretton, 98
Wall *v.* City of London Real Property Co., 1313
Wallace *v.* Gibson, 701
— *v.* McCartan, 512
— *v.* Small, 1103
Waller *v.* Loch, 533
Wallingford *v.* Mutual Society, 1207
Wallis *v.* Hands, 876, 899
— *v.* Smith, 888, 1286, 1306, 1316
— and Bernard's Contract, *In re*, 1164, 1195
— Son & Wells *v.* Pratt & Haynes, 793
Walmesley, *In re*, 1406
Walsh *v.* Bishop of Lincoln, 732
— *v.* Lonsdale, 877, 887
Walsham *v.* Stainton, 1442
Walstab *v.* Spottiswoode, 1422
Walter *v.* Everard, 1371
— *v.* James, 843
— *v.* Lane, 606
— *v.* Selfe, 506
— *v.* Steinkopff, 606
— *v.* Yalden, 1137
Walter D. Wallet, The, 462, 474
Walters *v.* Green, 506, 628
— *v.* Morgan, 1171
— *v.* W. H. Smith & Son, Ltd., 479
Walthamstow U. D. C. *v.* Henwood, 1107
Walton, *Ex parte*, *In re* Levy, 898
— *v.* Lavater, 603
Wandsworth Board of Works *v.* United Telephone Co., Ltd., 243
Warburton *v.* Heyworth, 862
Ward *v.* Hobbs, 726
— *v.* Pilley, 1008
— & Co. *v.* Wallis, 952
— Lock & Co. *v.* Long, 780
Warden *v.* Sewell, 1266
Waring *v.* Waring, 1380
Warlow *v.* Harrison, 713
Warmstrey *v.* Lady Tanfield, 772
Warne & Co. *v.* Seebohm, 605
Warr & Co. *v.* L. C. C., 875
Warrick *v.* Queen's College, Oxford, 570, 581
Wasdale, *In re*, 785
Wason *v.* Walter, 528, 536
Waterhouse *v.* Keen, 952
— *v.* Waterhouse, 1368
Waters *v.* Monarch, &c., Insurance Co., 929
Watkin *v.* Hall, 526, 527
Watkins *v.* North American, &c., Co., 1001
— *v.* Rymill, 639, 646, 647, 654, 687
Watson *v.* Jackson, 1354
— *v.* Jones, 1099
— *v.* McEwan, 532
— *v.* Mid-Wales Ry. Co., 788
— *v.* Spratley, 706
— *v.* Wellington (Duke of), 777
Watt *v.* Watt, 1334
Watteau *v.* Fenwick, 845
Waugh *v.* Carver, 855
— *v.* Morris, 680, 730, 741
Weare, *In re*, 1457
Weaver *v.* Ward, 317
Webb *v.* Bird, 11, 407, 596
— *v.* East, 1098
— *v.* Smith, 854
— Hale & Co. *v.* Alexandria Water Co., Ltd., 838
Webber *v.* Lee, 706
Weblin *v.* Ballard, 867
Webster *v.* Cecil, 726
— *v.* Friedeberg, 1289
— *v.* Watts, 478
— *v.* Webster, 1358
Wedd *v.* Porter, 878, 883
Wedgwood *v.* Adams, 1170
Weekly *v.* Wildman, 581
Wegg Prosser *v.* Evans, 670, 676
Weiner *v.* Gill, 797
— *v.* Harris, 797, 846
Weir *v.* Barnett, 556
— *v.* Bell, 556, 557, 558
Weiser *v.* Segar, 1277
Welch *v.* Anderson, 1312
Welcome *v.* Upton, 577, 585
Weld-Blundell *v.* Stephens, 427, 847
— *v.* Wolseley, 1093
Weldon *v.* Winslow, 1357
Wellaway *v.* Courtier, 448, 451
Wells *v.* Allott, 1207
— *v.* Watling, 587
Welsbach *v.* New Incandescent Co., 600
Welstead *v.* Hadley, 741
Wemyss *v.* Hopkins, 1073
Wenman *v.* Ash, 518
Wennhak *v.* Morgan, 459, 518
Wentworth *v.* Tubb, 1387
West *v.* Bristol Tramways, 11, 488, 504, 507, 509
— *v.* Gwynne, 1162, 1163
— *v.* Newing, 36, 768
— Devon Great Consols Mine, *In re*, 854
— Leigh Colliery Co. *v.* Tunnicliffe, 1138, 1278, 1324
— Norfolk, &c., Co., *v.* Achdale, 410
— of England Fire Insurance Co. *v.* Isaacs, 930
— Rand Mining Co. *v.* R., 1427
Westacott *v.* Hahn, 745, 884
Western Counties' Manure Co. *v.* Lawes Chemical Manure Co., 541, 543, 544
— Wagon Co. *v.* West, 779
Weston *v.* Fidler, 901
— *v.* Metropolitan Asylum District, 888
Weston-super-Mare U. D. C. *v.* Henry Butt & Co., 503
Westwick *v.* Theodor, 865
Wetherell *v.* Jones, 730
Whaite *v.* Lancs. and Yorks. Ry. Co., 648
Whaley Bridge Printing Co. *v.* Green, 560
Whalley *v.* Lancs. and Yorks. Ry. Co., 594
Whatman *v.* Pearson, 1417
Wheatley *v.* Smithers, 859

Wheaton *v.* Maple, 571
Wheeldon *v.* Burrows, 568
Wheeler *v.* Le Marchant, 1098, 1099
— *v.* Whiting, 963
Whistler *v.* Forster, 815
Whitbourne *v.* Williams, 564
White *v.* Crisp, 251
— *v.* Lincoln, 847
— *v.* Mellin, 540, 541, 544, 1159
— *v.* Morley, 97
— *v.* Morris, 459
— *v.* Proctor, 853
— *v.* Spafford, 1238
— (John) & Sons *v.* White, 591, 594
Whitehead, *In re*, 1446
Whitehorn Bros. *v.* Davison, 371, 372
Whiteley *v.* Edwards, 1365
— *v.* Hilt, 800
Whitfield *v.* S. E. Ry. Co., 1418
Whitham *v.* Kershaw, 908, 1309
Whiting *v.* De Rutzen, 1392
Whitlock's Case, 887
Whitmores (Edenbridge), Ltd. *v.* Stanford, 593
Whittaker *v.* Scarborough Post, 1318
Whittingham *v.* Murdy, 1376
Whitty *v.* Dillon, 885
Whitwham *v.* Westminster, &c., Co., 1288
Wicks *v.* Dowell & Co., 941, 944
Wiedemann *v.* Walpole, 1099
Wiesener *v.* Rackow, 778
Wigan *v.* English and Scottish, &c., Association, 691
— *v.* Law Life Assurance Association, 783, 786, 927
Wigglesworth *v.* Dallison, 82, 86, 696, 902, 1094
Wigsell *v.* School for Indigent Blind, 1307
Wild *v.* Tomkinson, 1369
Wild's Case, 300
Wilde, *In re*, 1456
Wilder *v.* Speer, 968
Wilding *v.* Sanderson, 669
Wildman *v.* Wildman, 767
Wilkes *v.* Wood, 477, 1282
Wilkins *v.* Day, 501
— *v.* Weaver, 562
Wilkinson *v.* Anglo-Californian Gold Mining Co., 671
— *v.* Downton, 545, 1303
— *v.* Evans, 712
— *v.* Jagger, 1343
— *v.* Lancs. and Yorks. Ry. Co., 656
— *v.* Verity, 1138
Willans *v.* Taylor, 550
William Brandt's Sons & Co. *v.* Dunlop Rubber Co., 783, 786, 789
— Pikersgill & Sons *v.* London, &c., Co., 934
— Robinson & Co. *v.* Heuer, 740
Williams, *In re*, 927
— *v.* Ayres, 90
— *v.* Beaumont, 1417
— *v.* Brisco, 1171
v. Carwardine, 686
— *v.* Currie, 1304
— *v.* Earle, 770, 1313
Williams *v.* Evans, 71, 75
— *v.* G. W. Ry. Co., 656
— *v.* Jones, 511
— *v.* Jordan, 698
— *v.* Lewis, 883
— *v.* Mersey Docks, &c., 1139
— *v.* Millington, 636, 854
— *v.* North China Insurance Co., 844
— *v.* Raggett, 1287
— *v.* Salisbury (Bishop of), 212
— *v.* Smith, 475
— *v.* Weston-super-Mare U. D. C., 1164
— *v.* Wilcox, 1217
— *v.* Williams, 339
— and Lancs., &c., Insurance Co., *In re*, 942, 945
— Bros. *v.* Agius, 1312
Williamson *v.* Rover Cycle Co., 1109
Willingale *v.* Maitland, 582
Willis *v.* Barron, 718
— *v.* Earl Howe, 1142
— *v.* Lovick, 736
— *v.* Maclachlan, 474
Willmott *v.* London Road Car Co., 895
Willoughby *v.* Backhouse, 464
Wilmot *v.* Alton, 772
Wilson *v.* Amalgamated Soc., 1424
— *v.* Brett, 638
— *v.* Carnley, 733
— *v.* Curzon (Viscount), 1422
— *v.* Fearnley, 100
— *v.* Fendall, 212
— *v.* Finch Hatton, 907
— *v.* Glossop, 1362
— *v.* Jones, 921
— *v.* Merry, 867
— *v.* Rastall, 1099
— *v.* Twamley, 896
— *v.* Union Oil Mills Co., 600, 604
— *v.* Waddell, 410
— *v.* Willes, 86
— *v.* Wilson, 1093
Wilson's (Carus) Case, 1175
Wiltshire *v.* Rabbits, 767
Wilts., &c., Canal Co. *v.* Swindon Waterworks Co., 592, 1158
Wimble, Sons & Co. *v.* Rosenberg & Sons, 802
Wimbledon Olympia, *In re*, 1413
Winchester (Bishop of) *v.* Knight, 1395
Windhill Local Board *v.* Vint, 210, 733
Windsor, &c., Ry. Co. *v.* The Queen, &c., 907, 1183
Wing *v.* Harvey, 926, 930
— *v.* London General Omnibus Co., 501
— *v.* Mill, 692
Winkfield, The, 456, 460, 466, 635
Winn *v.* Mossman, 71
Winspear *v.* Accident Insurance Co., 941
Winstone *v.* Linn, 865
Winterbottom *v.* Wright, 431
Wise *v.* Dunning, 162, 186, 668
— *v.* G. W. Ry. Co., 648
Wohlgemuthe *v.* Coste, 1343
Wollaston *v.* Stafford, 890

Wolverhampton Corporation *v.* Emmons, 1168, 1169
Womersley *v.* Dally, 81
Wood *v.* Conway, 507, 1158
— *v.* Cox, 175
— *v.* Earl of Durham, 1320
— *v.* Gray, 495
— *v.* Leadbitter, 578
— *v.* Lewis, 1366
— *v.* McCarthy, 1423
— *v.* Waud, 593, 594
— *v.* Woad, 12
Woodall *v.* Clifton, 896
Woodbridge *v.* Spooner, 695
Woodcock *v.* Houldsworth, 826
Woodfall *v.* Pearl Assurance Co., 969
Woodhall, *Ex parte*, 1175
Woodland *v.* Fear, 951
Woodruff *v.* Brecon, &c., Ry. Co., 1169
Woods *v.* Woods, 212
Woodward *v.* Goulstone, 1104
— *v.* L. & N. W. Ry. Co., 649
Woolfe *v.* Horne, 713
Woollen *v.* Wright, 842
Wordsley Brewery Co. *v.* Halford, 901
Wormer *v.* Biggs, 968
Worthington *v.* Jefferies, 1179
Wotherspoon *v.* Currie, 426, 619
Wren *v.* Holt, 795
Wrexham, &c., Ry. Co., *In re*, 846
Wright *v.* Carter, 718, 1452
— *v.* Glyn, 845
— *v.* Laing, 754
— *v.* Maidstone, 835
— *v.* Ramscot, 962
— *v.* Stavert, 706
Wrightup *v.* Chamberlain, 1300
Wyatt *v.* Gore, 1319, 1321
— *v.* Harrison, 588
— *v.* Palmer, 669
— *v.* Rosherville Gardens Co., 509
— *v.* White, 461, 547
Wynne-Finch *v.* Chaytor, 1009

X.

XENOS *v.* Wickham, 671, 853

Y.

YANGTSZE INSURANCE ASSOCIATION *v.* Indemnity, &c., Co., 916
Yates *v.* Dunster, 929
— *v.* Pym, 88
— *v.* South Kirby, &c., Collieries, 939, 944, 1303
Ydun, The, 1139
Yeates *v.* Groves, 786
— *v.* Reed, 1386
Yellowly *v.* Gower, 886
Yeoman *v.* Ellison, 889
Yonge *v.* Toynbee, 850, 854, 1365, 1389, 1446, 1447
York, *In re* Dean of, 1179
— *v.* Stowers, 1167
Yorke *v.* Yorks. Insurance Co., 925
Yorkshire Insurance Co. *v.* Campbell, 935
— Miners' Assoc. *v.* Howden, 1423
— Provident Co. *v.* Gilbert, 1239
Young, *In re*, *Ex parte* Jones, 857
— *v.* Ashley Gardens Properties, 1163
— *v.* Black Sluice Commissioners, 1229
— *v.* Davis, 250
— *v.* Glover, 819
— *v.* Grote, 828
— *v.* Hickens, 265
— *v.* Hughes, 769
— *v.* Kershaw, 1334
— *v.* Kitchin, 787, 788
— *v.* Leamington (Mayor of), 673, 747, 1421
— *v.* Macrae, 69, 544
— *v.* Schuler, 1091
— *v.* Young, 1358
— & Co. (John) *v.* Bankier Distillery Co., 591
Yzquierdo *v.* Clydebank Engineering Co., 1315, 1432

Z.

ZIMBLER *v.* Abrahams, 705, 877
Zunz *v.* S. E. Ry. Co., 647, 653

TABLE OF STATUTES.

	PAGE
20 Hen. III. (Provisions of Merton, 1235)	59
c. 9	1461
51 Hen. III. stat. 4	464
52 Hen. III. c. 4 (Statute of Marlbridge, 1267)	59, 464, 893
3 Edw. I. (Statute of Westminster I. 1275)	
c. 9	209
c. 25	206
c. 26	188
6 Edw. I. c. 8 (Statute of Gloucester, 1278)	965, 975
13 Edw. I. (Statute of Westminster II. 1285)	
c. 10	1436
c. 34	55
18 Edw. I. c. 1 (*Quia Emptores*, 1290)	82
25 Edw. I. c. 29	1432
17 Edw. II. stat. 1, cc. 9, 10	1381
4 Edw. III. c. 7	437, 1394
18 Edw. III. stat. 1, cc. 1, 4	1432
23 Edw. III. (Statute of Labourers, 1349)	78, 585
25 Edw. III. stat. 1, c. 7	974
stat. 5, c. 2 (Statute of Treasons, 1352)	132, 142–147, 375, 1479
c. 4	1174
c. 5	437, 1394
27 Edw. III. stat. 2, c. 5	56
34 Edw. III. c. 1	973
36 Edw. III. stat. 1, c. 12	974
1 Rich. II. c. 4	206
5 Rich. II. stat. 1, c. 7	170, 450, 964
13 Rich. II. stat. 1, c. 5	1016
15 Rich. II. c. 2	170
c. 3	1016
8 Hen. VI. c. 9	170
11 Hen. VII. c. 1	143
19 Hen. VII. c. 7, s. 1	96
25 Hen. VIII. c. 20	156
32 Hen. VIII. c. 9	201, 206
c. 34, ss. 1, 2	770, 896
33 Hen. VIII. c. 39	1425
34 & 35 Hen. VIII. c. 4	1399
35 Hen. VIII. c. 2	137, 150
1 Edw. VI. c. 12	149
5 & 6 Edw. VI. c. 11, s. 4	137
2 & 3 Ph. & M. c. 7	22
1 Eliz. c. 1, s. 6	211
13 Eliz. c. 4	1425
c. 5	680, 782
c. 10, s. 4	890
18 Eliz. c. 5	105, 209
27 Eliz. c. 4	677
31 Eliz. c. 5, s. 5	1140
c. 6, s. 5	732
c. 12	22
43 Eliz. c. 2	73
21 Jac. I. c. 3, s. 4	598
s. 6	598, 600, 601
c. 16 (Statute of Limitations, 1623)	1136
s. 3	438, 439, 701, 1134, 1139, 1397
s. 7	439
3 Car. I. c. 1 (Petition of Right, 1627)	1174
13 Car. II. c. 5	161
13 & 14 Car. II. c. 26	77
15 Car. II. c. 17	897
16 Car. II. c. 7	735
17 Car. II. c. 7, s. 4	890
22 & 23 Car. II. c. 10, s. 4	77
29 Car. II. c. 3 (Statute of Frauds, 1677)	697, 841, 1094, 1130
ss. 1, 2	673, 876
s. 3	899
s. 4	567, 697–709
s. 17	697, 709
c. 7	731
c. 9, s. 1	211
31 Car. II. c. 2 (Habeas Corpus Act, 1679)	141, 156, 190, 202, 1174
s. 5	1175
s. 10	1174
1 Wm. & M. c. 18, ss. 4, 17	212
sess. 2, c. 2 (Bill of Rights, 1688)	12, 161, 531, 1425
2 Wm. & M. c. 5, s. 1	894, 953
s. 2	893, 895
ss. 3, 4	1284
4 Wm. & M. c. 18, s. 1	1068
7 & 8 Will. III. c. 3, s. 1	149
s. 2	149, 1100
s. 4	1100
s. 5	149, 1047
s. 6	1047
s. 7	149
s. 11	998
8 & 9 Will. III. c. 11, s. 6	1398
s. 8	675, 751
9 Will. III. c. 35, s. 2	1047
10 Will. III. c. 23, s. 1	247
11 Will. III. c. 7, ss. 7–10	335
c. 12	995, 1427

PAGE
12 & 13 Will. III. c. 2 (Act of Settlement, 1700) . 1425
1 Anne, stat. 2, c. 21 . 132, 142, 144
3 & 4 Anne, c. 9 . 771, 810
4 & 5 Anne, c. 3, ss. 12, 13 . 675
s. 19 . 439
c. 16 . 1285
s. 9 . 896
s. 20 . 771
6 Anne, c. 11 . 1022
c. 41 (Act of Succession, 1707) . 132, 142, 144
c. 78 . 1022
7 Anne, c. 5, s. 3 . 1429
c. 20 . 897
c. 21, s. 1 . 1046
s. 11 . 149
c. 25 . 771
8 Anne, c. 14, ss. 6, 7 . 889
c. 19 . 604
9 Anne, c. 19, s. 1 . 735
12 Anne, stat. 2, c. 12, s. 2 . 732
1 Geo. I. stat. 2, c. 5 (Riot Act, 1715) 165, 189, 299
s. 2 . 165
s. 3 . 167, 168, 299
s. 8 . 1046
4 Geo. I. c. 11 . 335
8 Geo. I. c. 24, s. 1 . 335
2 Geo. II. c. 22 . 1231
c. 28 . 335
4 Geo. II. c. 21, s. 1 . 1429
c. 28, s. 1 . 908, 1259, 1284
8 Geo. II. c. 24 . 1231
9 Geo. II. c. 5 . 232
11 Geo. II. c. 19, ss. 1, 2 . 771, 893
s. 3 . 893, 953
ss. 7–9 . 893
s. 14 . 907
s. 16 . 1042
s. 18 . 908, 1259, 1284
s. 19 . 465
18 Geo. II. c. 30 . 335
19 Geo. II. c. 21, s. 12 . 1047
24 Geo. II. c. 40, s. 12 . 731
c. 44, s. 6 . 482, 1131
s. 8 . 482
25 Geo. II. c. 36, s. 5 . 223, 247
26 Geo. II. c. 33 . 1426
28 Geo. II. c. 19, s. 1 . 223
9 Geo. III. c. 18 . 1136
10 Geo. III. c. 47, s. 4 . 995
12 Geo. III. c. 1 . 1426
c. 11, s. 3 . 157
c. 24, s. 1 . 397
13 Geo. III. c. 21 . 1429
c. 63, s. 39 . 995
14 Geo. III. c. 48, s. 1 . 921
s. 2 . 922, 924
s. 3 . 923
c. 78, s. 86 . 885
c. 96 . 120
21 Geo. III. c. 70, s. 7 . 995
32 Geo. III. c. 56, s. 2 . 863
c. 60 (Fox's Libel Act, 1792) . 159, 960
33 Geo. III. c. 52, s. 62 . 191

PAGE
36 Geo. III. c. 7 . 132, 142, 144, 145, 148
37 Geo. III. c. 70, s. 1 . 156
38 Geo. III. c. 87, ss. 1–5 . 1393
39 Geo. III. c. 69, s. 104 . 397
39 & 40 Geo. III. c. 93 . 149, 1100
c. 94 . 1072, 1386
42 Geo. III. c. 85, s. 1 . 1427
c. 119, s. 1 . 247, 735
45 Geo. III. c. 85, s. 1 . 137
48 Geo. III. c. 58, s. 1 . 1069
c. 75 . 16
51 Geo. III. c. 64, s. 4 . 771, 838
52 Geo. III. c. 104, s. 7 . 137
c. 155, s. 12 . 214
c. 156 . 205
53 Geo. III. c. 160 . 212
55 Geo. III. c. 50, ss. 9, 13 . 188
56 Geo. III. c. 100 . 190, 1174
57 Geo. III. c. 6 . 144
c. 19, s. 23 . 161
c. 52 . 1042
59 Geo. III. c. 12, s. 24 . 1042
60 Geo. III. & 1 Geo. IV. c. 1, s. 1 . 156
s. 7 . 1047
c. 8, s. 1 . 154
1 & 2 Geo. IV. c. 88 . 206
3 Geo. IV. c. 71 . 235
c. 113, s. 9 . 335
c. 114 . 111, 163
4 Geo. IV. c. 60, s. 41 . 247, 1416
ss. 62, 67 . 1416
c. 76, s. 20 . 12
s. 21 . 216, 1047, 1353
s. 22 . 12
5 Geo. IV. c. 83 (Vagrancy Act, 1824) 231, 1097, 1123
s. 3 . 231
s. 4 . 226, 229, 232, 375
s. 5 . 233
s. 6 . 479
s. 8 . 233
s. 13 . 234
6 Geo. IV. c. 50, s. 30 . 994
s. 61 . 201
7 Geo. IV. c. 46 . 673, 1411
c. 64, ss. 12, 13 . 1046
7 & 8 Geo. IV. c. 28, s. 2 . 1072
9 Geo. IV. c. 14, s. 1 . 693, 1141
s. 6 . 703
s. 7 . 709
c. 31, s. 2 . 142
s. 10 . 297
c. 69 (Night Poaching Act, 1828) . 342
s. 4 . 184, 1047
s. 9 . 184, 991
s. 12 . 184
c. 94 . 732
10 Geo. IV. c. 50, ss. 22, 23 . 880
11 Geo. IV. & 1 Will. IV. c. 47, ss. 2–4 1397
c. 68, s. 1 . 646, 648
ss. 2, 3 . 649
s. 4 . 646
ss. 5, 7 . 649
s. 8 . 650
s. 9 . 649
c. 70, ss. 13, 14 . 1024

PAGE
1 & 2 Will. IV. c. 32 (Game Act, 1831) . 342
  s. 4 . . . 731
  s. 13 . . 966
  s. 25 . . 731
  s. 30 . . 342
  s. 36 . . 966
  c. 37 . . 660, 731
  ss. 1–3 . . 866
2 & 3 Will. IV. c. 34, ss. 1, 3, 6 . 375
  c. 39 . . . 977
  c. 53, s. 49 . . 373
  c. 71 (Prescription Act, 1832). 25, 566, 570
  s. 1 . . 78, 570
  s. 2 . . 78, 570, 574, 577, 584, 590
  s. 3 . . . 571
  s. 4 . . 572, 574
  s. 7 . . . 573
  s. 8 . . 573, 574
  s. 9 . . . 574
3 & 4 Will. IV. c. 19, s. 29 . . 235
  c. 27, s. 42 . . 907
  c. 41 . . . 1022
  c. 42 (Civil Procedure Act, 1833), s. 2 . 437, 1394, 1395
  s. 3 . 681, 907, 954, 1134, 1139
  s. 5 . 1134, 1139, 1140
  s. 7 . . . 439
  s. 28 1152, 1153, 1289
  s. 29 1153, 1289
  ss. 37, 38 . 889
  c. 98, s. 6 . . . 832
4 & 5 Will. IV. c. 36 . . . 993
  s. 22 . . 994
5 & 6 Will. IV. c. 41, s. 1 . . 735
  c. 50 (Highway Act, 1835)
  s. 23 . . 250
  s. 70 . . 252
  s. 72 . . 107, 120, 252
  s. 76 . . 252
  s. 78 . . 253
  ss. 84–92 10, 992
  ss. 94–96 . 250
  c. 54 . . 216, 1353
  c. 59 . . . 235
6 & 7 Will. IV c. 37, s. 4 . . 731
  c. 85, s. 39 . 216, 1353
  s. 41 . . 1047
  c. 114, s. 4 . . 1059
7 Will. IV. & 1 Vict. c. 88, ss. 2, 3 . 335
  c. 91, s. 1 . 165, 206, 335
  s. 52 . 156
1 & 2 Vict. c. 38 231
  s. 2 . . . 229
  c. 74, s. 1 . . . 1042
1 & 2 Vict. c. 110, s. 12 1325
  s. 17 . . . 1152
2 & 3 Vict. c. 11 1426
  c. 47, s. 54 . . 235, 247
  s. 63 . . . 481
  s. 64 . . . 479
3 & 4 Vict. c. 9 531
  c. 85 866
  c. 86, s. 3 . . . 1177
  c. 97, s. 13 . . . 268
5 Vict. c. 5 977
5 & 6 Vict. c. 38, s. 1 . . 214, 251, 255, 990
  c. 45, s. 3 . . . 604
  ss. 16, 17 . . 609
  s. 42 . . . 605
  c. 51, s. 1 . . . 149
  s. 2 . . . 151
  c. 56, s. 1 . . . 1100
  c. 108 880
6 & 7 Vict. c. 18, s. 88 . . . 1100
  c. 40, s. 18 . . . 892
  c. 73, s. 2 . . . 1448
  s. 23 . . . 1445
  ss. 27, 31 . . 1446
  s. 32 . .1454, 1455, 1457
  ss. 37, 48 . . 1450
  c. 96 (Lord Campbell's Libel Act, 1843) 960, 1278
  ss. 1, 2 . . 525, 960
  s. 3 . . . 183
  ss. 4, 5 . . 174, 179
  s. 6 . 157, 178, 1074
  s. 7 . 130, 179
  s. 8 . . . 432
7 & 8 Vict. c. 2 994
  c. 32, ss. 10, 12 . . 832
  c. 113, s. 47 . . 673, 1411
8 & 9 Vict. c. 16, ss. 14, 97 . . 673
  c. 17, s. 45 . . . 771
  c. 18 . . . .1038, 1194
  ss. 3, 22, 24 . . 1042
  s. 39 . . . 432
  c. 20, s. 68 . . 486, 589
  c. 37, s. 6 . . . 832
  c. 38, s. 15 . . . 832
  c. 42, s. 2 . . . 100
  c. 75 525
  c. 99, s. 1 . . . 880
  c. 100, s. 44 . . . 118
  c. 106, s. 3 . . 673, 674, 876, 896, 899
  s. 9 . . . 900
  c. 109 . . . 247, 736
  s. 17 . . . 374
  s. 18 . . . 735
  c 113, s. 3 . . . 1101
  c. 127, s. 8 . . . 1325
9 & 10 Vict. c. 59, s. 4 . . . 214
  c. 93 (Fatal Accidents Act, 1846) . 494, 922, 939, 1378
  s. 1 . . . 437
  s. 2 . . 868, 1394

	PAGE
9 & 10 Vict. c. 93, s. 3	74, 868, 1136, 1139
ss. 4, 5	868
c. 95	975, 979, 1029
10 & 11 Vict. c. 15, s. 14	893
c. 27, ss. 83–89	100
c. 34, s. 45	888
c. 52	1022
c. 89, s. 28	247
s. 69	101
11 Vict. c. 12 (Treason Felony Act, 1848)	132, 145, 150, 1100
s. 2	144
s. 3	150
s. 6	145
s. 7	145, 151
11 & 12 Vict. c. 42	1051, 1055, 1058, 1105
s. 16	1054
s. 18	1055
s. 19	1058
s. 20	1056
s. 25	1054
s. 27	1059
c. 43	985, 1052
s. 2	1041
s. 8	1040
s. 12	1058
s. 36	1140
c. 44, s. 1	482
s. 2	483
s. 4	482
c. 78	983
12 & 13 Vict. c. 92, ss. 7–12, 29	235
c. 106	693
13 & 14 Vict. c. 21	75
c. 43, s. 11	1023
c. 101, s. 9	205, 322
14 & 15 Vict. c. 19, s. 5	306, 320, 1083
s. 11	479
c. 25	904
s. 1	881, 902
s. 2	892
c. 99	1095
s. 3	1098
s. 14	1101
c. 100, s. 9	111, 226, 1083
s. 12	257, 1083
s. 29	194, 228, 255
c. 105, s. 18	205, 322
15 & 16 Vict. c. 76 (C. L. Procedure Act, 1852)	977
s. 40	1359
s. 209	953, 1258, 1284
s. 210	444, 888, 1261, 1264, 1269
ss. 211, 212	1261
Sched. B	406, 422, 634
c. 80	978
c. 86	978
c. lxxvii.	1036
16 Vict. c. 30, s. 1	474
16 & 17 Vict. c. 70, s. 2	1381
c. 83	1097
s. 3	1098
c. 119	247, 736
c. 137, ss. 21, 26	880
17 & 18 Vict. c. 31	1025, 1026
s. 1	647, 650
s. 2	653
s. 7	650
c. 38, s. 4	1053
c. 60, s. 3	235
c. 82, s. 12	1023
c. 102	1121
c. 125 (C. L. Procedure Act, 1854)	977
ss. 23, 24	1076
s. 25	1090
s. 26	1102
s. 60 *et seq.*	782
18 & 19 Vict. c. 43	1367, 1376
c. 111	771, 799, 801, 803
s. 1	914
s. 3	913
c. 120	98, 99
s. 229	481
c. 124	880
19 & 20 Vict. c. 16, ss. 1, 3	994
c. 55	1410
c. 94	77
c. 97, s. 1	1326
s. 2	1155
s. 3	698, 701
s. 9	1134, 1139
s. 10	439, 1134
s. 11	1134
s. 12	439, 1134
s. 13	693, 1134, 1140
s. 14	1134, 1141
c. 119, ss. 2, 18	1367
c. xvii., s. 18	1038
20 & 21 Vict. c. 43, s. 2	989
c. 49, s. 12	673, 1411
c. 77	980, 1017
ss. 70, 72	1393
s. 73	1392
s. 74	1393
c. 83, s. 1	228
c. 85	980
s. 16	1354
s. 26	1363
s. 59	1354
c. clvii., s. 12	1036
s. 45	1013
21 & 22 Vict. c. 44	880
c. 57	880
c. 73, s. 9	989
c. 90, s. 27	1107
s. 32	663, 731
c. 95	980, 1032
s. 18	1393
c. 98, s. 13 (5)	114
22 & 23 Vict. c. 17	227, 1121
c. 35, ss. 27–29	1396, 1426
23 & 24 Vict. c. 32, s. 2	214, 480
s. 3	480
c. 34	1183
ss. 1–3, 5, 6	1184
s. 18	1183
c. 38	1326
c. 59	880
c. 75, s. 13	310
c. 126, s. 1	977, 1261

PAGE

23 & 24 Vict. c. 127, s. 22 . . 1107
s. 26 . . 1448
c. 136 1440
24 & 25 Vict. c. 62 1136
c. 96 (Larceny Act, 1861)
s. 1 . . . 366
s. 3 . . . 350
ss. 12, 13, 17 . 342
ss. 18, 21 . . 342
s. 24 . . 342, 965
s. 25 . . . 965
s. 26 . . . 342
ss. 75, 76 . 362, 1457
s. 87 . . . 991
s. 88 . . 1083
s. 100 . . 1120
ss. 101, 102 . 209
s. 103 . . 1051
s. 104 . . 481
97 (Malicious Damage Act, 1861) . 124
s. 1 . . . 398
ss. 2, 3 . 398, 1468
ss. 4–6 . . 398
ss. 7, 8 . . 398
ss. 9, 10 . . 398
ss. 11, 12 . 169, 400
s. 13 . . . 402
s. 14 . . . 400
s. 15 . . . 401
ss. 16, 17 . . 400
ss. 18, 19 . . 401
ss. 20, 21 . . 402
s. 22 . 402, 1475, 1476
ss. 23–25 . . 402
ss. 26, 27 . . 400
ss. 28, 29 . . 401
s. 30 . . 400
ss. 31, 32 . . 401
s. 33 . 251, 314, 400
s. 34 . . 402
ss. 35, 36 . 314, 400, 1475
s. 37 . . 338, 402
ss. 38, 39 . . 402
s. 40 . . . 401
s. 41 . . . 402
s. 42 . . 397, 399
ss. 43, 44 . . 397
s. 45 . 398, 401
s. 46 . 397, 401
s. 47 . 314, 400
ss. 48, 49 . . 401
s. 50 . . . 181
s. 51 . 124, 402, 403
ss. 54, 55 . . 398
s. 58 . . 251
s. 61 . . . 479
s. 73 . . . 251
c. 98 (Forgery Act, 1861) . . 386
s. 3 . . 373, 386
s. 5 . . 362, 386
s. 6 . . . 386
s. 24 . . . 390

PAGE

24 & 25 Vict. c. 98 (Forgery Act, 1861)
ss. 28, 34, 36, 37 . 386
s. 38 . . . 389
ss. 42–44, 47–end 386
c. 99 (Coinage Offences Act, 1861) . 375
s. 2 . . . 376
ss. 3, 4, 6–8 . 377
s. 9 . . 376, 1479
s. 10 . . . 376
s. 11 . . . 377
s. 12 . . 376, 377, 1479
s. 14 . . 376, 377
ss. 15, 16 . . 377
s. 18 . . . 376
s. 19 . . . 377
s. 22 . . . 376
ss. 23, 24, 27 . 377
ss. 29, 30 . . 376
c. 100 (Offences against the Person Act, 1861)
s. 4 . . 138, 255, 283, 307
s. 7 . . . 297
s. 8 . . . 142
s. 9 . . 137, 283
ss. 11–13 . 283, 305
s. 14 . 283, 305, 306
s. 15 . 283, 305, 309
s. 16 . . . 181
s. 18 . 111, 170, 306, 320, 321, 1480
s. 20 . 321, 322, 1480
s. 26 . . . 310
s. 27 . . . 312
ss. 32, 33 . . 314
s. 34 . . . 268
ss. 36, 37 . . 322
s. 38 . 170, 204, 322
s. 42 . 324, 474, 1044, 1049
s. 43 . . 323, 474
s. 44 . . . 474
s. 45 . . 324, 474
s. 46 . . 324, 474, 1052
s. 47 . . . 322
s. 48 . . 326, 1097
ss. 49–51 . . 1097
s. 52 . . 330, 1097
s. 53 . 221, 222, 1097
s. 54 . . 221, 1097
s. 55 . 118, 220, 1097
s. 56 . . . 223
s. 57 . 137, 215–217, 1046
ss. 58, 59 . . 225
s. 60 . 275, 307, 1083
s. 61 . . 226
s. 62 . 226, 227, 330
s. 63 . . 326
s. 74 . . 316
c. 110, ss. 4, 8 . 385
c. 114 . . . 1391

PAGE

- 25 & 26 Vict. c. 20, s. 1 . . . 1175
  - c. 26 . . . 1013
  - c. 68, ss. 7, 8 . . 386, 605
    - ss. 9–11 . . 605
  - c. 69 . . . 93
  - c. 89 . . . 771
  - c. 102 . . . 98, 99
  - c. 114 . . . 342
- 26 & 27 Vict. c. 41, s. 1 . . . 641
    - ss. 2, 3. . . 642
  - c. 92, s. 31 . . . 653
- 27 & 28 Vict. c. 95, s. 1 . . 437, 494, 868
  - c. 101, ss. 25, 51 . . 253
  - c. 112 . . . 669
    - ss. 1, 3 . . 1326
- 28 Vict. c. 18, s. 2 . . . 1079
    - s. 6 . . . 1090
    - s. 7 . . . 1102
  - c. 36, s. 16 . . . 203, 473
- 28 & 29 Vict. c. 57 . . . 880
  - c. 60 . . . 460
  - c. 78 . . . 771
  - c. 79 . . . 231
  - c. 94, s. 1 . . . 649
  - c. 104 . . . 1426
  - c. 124, s. 8 . . . 374
- 29 & 30 Vict. c. 19, s. 5 . . . 953
  - c. 109, ss. 10, 19 . . 156
    - s. 34 . . 397
- 30 & 31 Vict. c. 29, s. 1 . . 88, 429
  - c. 35, s. 6 . . . 1105
  - c. 84 . . . 246
  - c. 144 . . . 771, 924
    - s. 3 . . 924, 927
- 31 & 32 Vict. c. 24, s. 2 . . . 275
  - c. 37 . . . 1101
  - c. 40, s. 12 . . . 1031
  - c. 54 . . . 955
    - s. 5 . . . 1435
  - c. 71 . . . 72
  - c. 86 . . . 771
  - c. 119, s. 12 . . . 653
    - s. 14 . . . 652
    - s. 16 . . . 1026
  - c. 121, ss. 1, 15–17 . 314
  - c. 122, s. 37 . . 294
  - c. 125, s. 5 . . . 1012
  - c. cxxx. . . . 1035
- 32 & 33 Vict. c. 41, ss. 1, 8 . . 888
  - c. 46 . . . 678
  - c. 49 . . . 391
  - c. 51 . . . 72
  - c. 62 (Debtors Act, 1869) . 1122, 1369
    - s. 5 . . 1325, 1341
    - s. 6 . . 474, 1191
    - s. 11 . . 117, 1012
    - s. 12 . . . 1012
    - s. 13 . . 368, 374, 1477
  - c. 68, s. 2 . . 1099, 1277
    - s. 3 . . . 1097, 1098
  - c. 71, s. 22 . . . 771
  - c. 96 . . . 437
- 33 Vict. c. 10, s. 4 . . . 755
- 33 & 34 Vict. c. 14, s. 10 . . . 1429
  - c. 23, s. 1 . . 133, 1431
    - s. 2 . . . 1119
    - s. 4 . . . 1120
    - s. 8 . . . 1431
    - s. 12 . . 663, 1431
    - s. 30 . . . 1431
  - c. 28 . . . 1033
    - s. 20 . . . 1459
  - c. 35 . . . 900
  - c. 52 . . 1045, 1105, 1433
  - c. 58, ss. 1, 2, 4, 7, 8 . 386
  - c. 77 . . . 1432
  - c. 90 . . . 137, 171
    - ss. 4–9 . . . 172
    - s. 11 . . 172, 173
    - s. 13 . . . 172
  - c. 93 . . . 662, 1352, 1360
    - ss. 13, 14 . . 1365
  - c. 97, s. 55 . . . 832
- 34 & 35 Vict. c. 31, ss. 2, 7, 8 . . 1423
    - s. 9 . . 633. 1423
    - s. 10 . . . 1423
    - ss. 13–18 . . 1423
  - c. 41, s. 36 . . . 422
  - c. 105 . . . 245
  - c. 112, ss. 5, 7, 8 . . 1053
    - s. 12 . . . 323
    - s. 15 . . . 233
    - s. 16 . . . 1051
- 35 & 36 Vict. c. 15 . . . 15
    - s. 8 . . . 481
  - c. 33, s. 24 . . 192, 1100
  - c. 36 . . . 12
  - c. 50, s. 3 . . . 893
  - c. 65, s. 4 . . . 1099
  - c. 74, s. 2 . . 41, 289
    - ss. 2, 3 . . 106
  - c. 77 . . . 866
  - c. 92, s. 7 . . . 223
  - c. 93, ss. 16–19 . . 640
    - s. 34 . . . 480
    - ss. 37, 38 . . 385
  - c. 94, s. 13 . . . 118
    - s. 16 (2) . . 119
  - c. 98 . . . 246
  - c. xiii. . . . 71
- 36 & 37 Vict. c. 35 . . . 771
  - c. 36, s. 4 . . . 880
  - c. 38 . . . 231
    - s. 15 . . . 1025
  - c. 48 . . . 1026
  - c. 52 . . . 1392
  - c. 60 . . 1045. 1433
    - s. 5 . . . 1105
  - c. 66 (Judicature Act, 1873) 36, 59, 440, 458, 981, 1015, 1154
    - s. 8 . . . 1003
    - s. 16 . . 981, 1024, 1392
    - ss. 17, 18 . . 1381
    - s. 24 . . . 1150
    - s. 25 (3) . . 886

PAGE
36 & 37 Vict. c. 66, s. 25 (5) 31, 1160, 1257
s. 25 (6) 773–783, 788, 1214
s. 25 (7) 675
s. 25 (8) 1005, 1156, 1158, 1159, 1164, 1259
s. 34 1151
s. 39 1029
s. 40 1013
s. 45 1013, 1035
s. 47 1459
s. 83 1007
s. 87 1439
s. 89 1150, 1339
s. 90 1339
s. 100 1186
c. 71, ss. 39–45 100
c. 88 335
37 & 38 Vict. c. 36 373
s. 3 991
c. 42 1032
c. 50 662, 1352, 1360
c. 57, ss. 2–7 1135
s. 8 1136
c. 62, s. 1 662, 693, 1370, 1373
s. 2 662, 1375
c. 68, s. 12 731, 1444, 1445, 1448
c. 75 246
c. 78 1194
c. 88, s. 46 1047
38 & 39 Vict. c. 17 245
c. 21 247
c. 24 362, 1471
c. 25, ss. 4, 5 374
c. 27 1392
c. 55 (Public Health Act, 1875)
s. 44 97
ss. 52, 61 1042
ss. 80, 90 97
s. 104 888
s. 113 97
ss. 116–119 106
s. 141 97
ss. 150, 155 1042
s. 157 97
s. 160 888
ss. 164, 167, 169, 171, 172 97
s. 174 1421
ss. 176, 181 1042
ss. 182–188 97
s. 214 888
s. 228 1042
s. 253 954
s. 257 888
s. 299 502
s. 303 92
ss. 308, 328 1042

PAGE
38 & 39 Vict. c. 63 504
s. 6 1416
s. 27 119
s. 28 504
c. 66 1056
c. 77, s. 10 678
s. 11 1015
s. 17 92
s. 23 993
c. 79, s. 2 1450
c. 83 1033
c. 86, s. 3 260, 261
s. 4 106, 1040
s. 5 106, 313, 1040
s. 6 1040
s. 7 260, 506, 1040
s. 9 1040
c. 87 1448
c. 90 1032
c. 92 904
39 & 40 Vict. c. 22, s. 16 1423
c. 36, s. 193 205
s. 217 191
s. 234 92
ss. 257, 258 1046
c. 56 1032
c. 57 993
c. 59 1336
ss. 5, 6 1021
s. 17 92
c. 61, s. 34 1099
c. 66 1439
c. 75 508, 1033
s. 10 954
c. 77 402
s. 1 237
ss. 2, 3, 12 238
s. 22 237
40 & 41 Vict. c. 14, s. 1 251, 1095, 1097
c. 18 880
c. 21, s. 40 154
c. 25, s. 12 1445
s. 17 1439, 1446, 1459
s. 21 1439
c. 46 993
c. 62, s. 2 1448
c. 68 94, 119
41 Vict. c. 14, s. 11 226
41 & 42 Vict. c. 31 195, 799, 1216
s. 10 1448
Sched. 1216
c. 33 1417
c. 38, s. 1 29, 641
c. 73 138
c. 77, s. 10 249, 250
s. 23 502
42 Vict. c. 1 993
c. 11 1198, 1242
42 & 43 Vict. c. 19, s. 3 230, 1042
s. 29 1042
c. 22 1045
c. 30 504
c. 34 312, 866
c. 47 245

PAGE
42 & 43 Vict. c. 49 (Summary Jurisdiction Act, 1879) . 985, 1052
s. 4 . . . 231
s. 11 . . . 197
s. 14 . . . 1050
s. 17 . . 323, 1049
s. 20 . . . 1052
s. 25 . . . 185
s. 31 . . . 988
s. 33 . . . 989
ss. 34, 35 . . 1041
s. 51 . . . 954
s. 54 . . . 1041
Sched. I. . 1050, 1051
c. 59, s. 3 . . . 1432
c. 78, ss. 4–8 . . 1001
s. 9 . 1001, 1005
ss. 10–14 . . 1001
43 & 44 Vict. c. 35 237
c. 41, s. 7 . . 213, 215
c. 42 (Employers' Liability Act, 1880) 496, 867, 868, 872, 873, 944, 1032
s. 1 . . 437, 868, 1394
s. 2 . . . 868
ss. 3, 4, 6, 8 . 869
c. 45, s. 2 . . 226, 330
c. 47, s. 2 . . . 39
s. 3 . . 39, 731
44 & 45 Vict. c. 41 (Conveyancing Act, 1881) . 1195, 1269
s. 7 . . . 770
s. 10 . . 770, 887, 896, 1257
s. 11 . . 770, 896
s. 12 . . 770, 897
s. 14 . . 443, 908, 1130, 1261, 1267
s. 18 . . 31, 880
s. 47 . . . 1388
s. 56 . . . 1449
s. 59 . . 678, 1397
s. 69 . . . 1023
s. 70 . . . 442
c. 51 237
c. 58, s. 12 . . . 156
s. 92 . . . 863
s. 128. . . 1086
s. 156 . . 380
c. 60 . . . 535, 1122
s. 2 . . . 537
ss. 4, 5 . . 180
s. 15 . . . 1107
c. 67 245
c. 68, s. 19 . . . 92
c. 69 . . . 1045, 1433
s. 24 . . . 1051
45 & 46 Vict. c. 9, s. 3 . . . 1101
c. 19 13
c. 38 (Settled Land Act, 1882) . . 1033, 1195
s. 6 . . . 880

PAGE
45 & 46 Vict. c. 38 (Settled Land Act, 1882)
s. 7 . . . 877
ss. 8–14 . . 880
s. 48 . . . 93
ss. 58–62 . . 880
c. 39, s. 3 . . . 1450
c. 43 32
c. 50, s. 23 . . 96, 99
s. 108. . . 880
s. 164. . . 990
s. 195. . . 323
ss. 210–218 . 1410
s. 247. . . 97
c. 56 93
s. 22 . . . 402
s. 25 . . . 893
c. 61 (Bills of Exchange Act, 1882) . 469, 810, 1152, 1467
s. 3 . . 811, 812
s. 4 . . . 827
s. 5 . . 813, 830
s. 6 . . . 812
s. 7 . . 812, 813
s. 9 . . . 812
s. 10 . . . 811
s. 11 . . 811, 812
s. 14 . . . 824
s. 15 . . . 820
s. 16 . . . 819
s. 17 . . . 813
s. 19 . . . 814
s. 20 . . . 823
s. 22 . . . 837
s. 23 . . 818, 823
s. 24 . . . 843
s. 25 . . . 823
ss. 26, 28 . . 822
s. 29 . 815, 817, 833
s. 30 . . 815, 833
s. 31 . . 817, 818
s. 32 . . 818, 819
ss. 33, 35 . . 818
s. 36 . . . 824
s. 43 . 821, 824, 825
s. 44 . . . 814
s. 46 . . . 831
s. 47 . . 824, 825
s. 48 . . 825, 827
s. 49 . . . 825
s. 50 . . . 826
s. 51 . . 810, 835
s. 52 . . 825, 835
s. 54 . . . 821
s. 55 . . 821, 822
s. 56 . . . 822
s. 59 . . . 834
s. 61 . . . 836
s. 62 . . 763, 837
s. 63 . . . 837
s. 64 . 763, 835, 836
s. 65 . . 821, 825
ss. 66, 67 . . 825
s. 68 . . 821, 825
ss. 69, 70 . . 835
s. 71 . . . 827

PAGE
45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882)
ss. 72, 73 . 821, 827
s. 74 . . . 827
ss. 76—81 . . 828
s. 82 . . 810, 828
s. 83 . . 829, 830
s. 84 . . . 830
s. 85 . . . 829
s. 86 . 824, 831, 832
s. 87 . . . 831
ss. 88, 89 . . 830
s. 90 . . 832, 834
c. 72, s. 11 . . . 1242
c. 75 (Married Women's Property Act, 1882) . 662, 1032, 1097, 1195, 1352, 1359, 1360
s. 1 . . 438, 1356, 1358, 1400
s. 11 . . . 923
s. 12 . . 345, 346, 383, 1357
ss. 13–15 . 438, 1359
s. 16 . 346, 383, 398
ss. 20, 21 . . 1365
46 & 47 Vict. c. 3, s. 2 . . 314, 398
c. 38, s. 2 . . . 1386
c. 51 . . . 180, 192, 1012, 1121
s. 51 . . . 1047
c. 52 (Bankruptcy Act, 1883) . 799, 1122
s. 37 . . . 437
s. 57 . . . 1446
s. 92 . . . 980
s. 93 . . 980, 1010
s. 94 . . 980, 1010
c. 57, s. 32 . . 545, 605
c. 61 904
47 Vict. c. 12 97
47 & 48 Vict. c. 14, s. 1. . . . 1098
c. 18 . . . 1033, 1195
c. 39 156
c. 43 985
c. 54 897
c. 58 1045
c. 61, s. 15 . . . 1182
s. 19 . . . 1005
c. 64, ss. 5, 16 . 1082, 1386
c. 68 1353
c. 70 . . . 180, 192
ss. 30, 35, 36 . 1047
c. 71 1136
48 & 49 Vict. c. 33 . . . 98, 99
c. 55, s. 174 . . 673
c. 69 (Criminal Law Amendment Act, 1885) . 1097, 1122
ss. 2, 3 . 222, 1100
s. 4 . 326, 329, 1100
s. 5 . 330, 1047, 1379
s. 6 . . . 330
s. 7 . . . 221

PAGE
48 & 49 Vict. c. 69 (Criminal Law Amendment Act, 1885)
s. 8 . . . 222
s. 9 . 327, 329, 1083
s. 10 . . . 547
s. 11 . . . 227
s. 13 . . . 224
s. 17 . . . 991
s. 20 . . . 328
49 Vict. c. 20 16
49 & 50 Vict. c. 37 605
c. 38 . . . 169, 1033
ss. 6, 7 . . 169
c. 48, s. 6 . . . 663
50 & 51 Vict. c. 25, s. 17 . . . 794
c. 26 904
c. 28 . . 1121, 1122
s. 2 . 130, 374, 389, 612
s. 15 . . . 1047
s. 17 . . . 611
c. 30 1195
c. 46 . . . 660, 866
c. 55, s. 29 . . . 188
c. 58 866
c. 70 1336
s. 2 . . . 1021
c. 71, s. 4 . . . 1105
s. 5 . . 1067, 1105
s. 8 . . . 188
c. xiii. 1036
51 & 52 Vict. c. 12 93
c. 21, s. 4 . . . 892
ss. 5, 6 . . 895
s. 7 . . . 894
c. 25 . . . 1025, 1026
s. 4 . . . 1025
ss. 10, 12 . . 1025
s. 17 . . 1020, 1026
ss. 18, 20 . . 1026
s. 28 . . . 653
c. 41 (Local Government Act, 1888) . . 10
s. 3 . . . 992
s. 16 . . . 98
s. 59 . . . 92
s. 72 . . . 880
s. 75 . . . 1047
s. 83 . . . 990
s. 85 . . 98, 253
c. 42 880
c. 43 (County Courts Act, 1888) . 1337
s. 9 . . . 1342
s. 27 . . . 1033
s. 33 . . 1033, 1034
s. 37 . . . 1033
s. 41 . . 954, 1034
ss. 56–60 . . 1031
s. 61 . . . 1342
ss. 65, 66 . . 1222
ss. 67, 68 . . 1032
ss. 74, 75 . . 1030
s. 78 . . . 1337
s. 82 . . . 1339
s. 84 . . . 1030

PAGE
51 & 52 Vict. c. 43 (County Courts Act, 1888)
ss. 88–92 . . 1340
s. 93 . . . 1342
ss. 98, 99 . . 1337
s. 105 . . 1340
s. 113 . . 1034
s. 116 . 1149, 1280
s. 120 . . 1013, 1342–1344
s. 121 . . 1343
s. 123 . . 1344
s. 126 . 1028, 1181
s. 127 . . 1179
ss. 133–137 . 463
s. 147 . . 1341
s. 149 . . 1340
ss. 157, 162. . 1341
s. 185 . . 1036
c. 46, ss. 1, 2 . . 196
c. 51 . . . 669, 1326
c. 54 98
c. 59, s. 8 . . . 1137
c. 64 535
s. 3 . . . 536
s. 4 . . . 536
s. 6 . . . 1322
s. 7 . . . 228
s. 8 . . 180, 1071
c. 65, ss. 12–15 . . 1185, 1444, 1458
s. 16 . . . 1445
52 Vict. c. 10, s. 9 137
52 & 53 Vict. c. 18, s. 3 . . 230, 232
s. 6 . . . 230
c. 21, s. 20 . . . 731
s. 28 . . 97, 98
c. 30 . . . 93, 1410
c. 36 . . . 880, 1033
c. 44 . . . 61, 294
c. 45 . . 799, 801, 803
s. 2 . . . 846
c. 47, ss. 6–10 . . 1024
s. 11 . . 1020, 1024
c. 49 (Arbitration Act, 1889) . 1007, 1010, 1348
s. 3 . . 1007, 1010
s. 4 . 970, 1132, 1199
ss. 5, 6 . . 969
s. 7 . . . 943
s. 8 . . . 969
s. 9 . . . 970
s. 10 . . . 1009
s. 11 . . . 969
s. 13 . . 970, 1007, 1008, 1210
s. 14 . . 970, 1007, 1008, 1210
s. 15 . . . 970
ss. 16, 17 . 970, 1009
s. 19 . . 943, 1008
s. 22 . . . 197
c. 52 151
c. 57, s. 5 . . . 480
c. 63, s. 1 . . . 75
s. 2 . . 75, 1417
52 & 53 Vict. c. 63, s. 3 . . . 75
s. 13 . . . 1040
c. 69, s. 1 . 191, 364, 734
c. 72 246
53 Vict. c. 5 (Lunacy Act, 1890) . 1033
ss. 4–23 . . . 1382
ss. 90–106 . . . 1382
ss. 108, 111, 112, 116, 143 . . . 1381
ss. 150–187, 191–200 . 1382
s. 322 310
s. 324 . . . 1379
53 & 54 Vict. c. 21, s. 10 . . . 191
c. 23, s. 3 . . . 1023
s. 4 . . . 1020
c. 34 246
c. 39 (Partnership Act, 1890) . . 1467
s. 1 . . . 856
s. 2 . . 855, 856
s. 5 . . . 855
ss. 7, 8 . . 858
s. 14 . . . 857
s. 17 . . 759, 859
s. 23 . . . 860
s. 36 . . . 859
s. 38 . . . 860
c. 57 1033
c. 59, s. 3 . . . 98
s. 20 . . . 97
s. 23 . . 97, 98
s. 44 . . . 97
c. 63, s. 10 . . . 560
c. 64 . . 554, 557, 721, 1414
s. 3 . . . 725
s. 5 . . . 625
c. 69 . . 1033, 1195
ss. 7–10 . . 880
c. 70, s. 74 . . . 880
s. 75 . . . 882
c. 71 1122
s. 15 . . . 1446
54 Vict. c. 10 897
54 & 55 Vict. c. 15 1121
c. 37 98
c. 39 (Stamp Act, 1891) 391
s. 1 . . . 937
s. 40 . . . 912
s. 43 . 1444, 1445, 1448
s. 44 . . . 1448
ss. 49–51 . . 911
ss. 92–97 . . 933
s. 98 . . . 926
s. 99 . . 926, 928
s. 100 . . 752, 926, 928
s. 116 . . . 937
Sched. I. . . 862
c. 51 523
s. 1 . . . 1279
c. 65, s. 27 . . . 1386
c. 67 150
c. 69, s. 1 . . 205, 251
s. 4 . . 1053
c. 73 1195

PAGE
54 & 55 Vict. c. 76 98, 99
s. 29 436, 502
55 Vict. c. 4, ss. 1–3 1368
s. 5 1376
c. 9 736, 737
s. 1 848
55 & 56 Vict. c. 13 1269
s. 2 443, 908
c. 19 71, 150
c. 43 98
56 & 57 Vict. c. 21 677
c. 22 1021, 1336
c. 37, s. 10 1020, 1035
c. 39 1033
s. 35 674
c. 53 1015, 1186
s. 17 1449
s. 21 1396
s. 46 1023, 1024
c. 56, s. 3 (1) 118
c. 61 (Public Authorities Protection Act, 1893)
s. 1 74, 438, 483, 502, 1047, 1136, 1138
s. 2 1131
c. 63 662, 1352, 1360
s. 2 1357, 1366
c. 71 (Sale of Goods Act, 1893) 791, 841, 1094, 1467
s. 1 790
s. 2 791, 1371, 1387, 1390
s. 4 697, 707, 709–715, 802, 1130
s. 5 791
s. 6 755, 791
s. 7 755, 792
s. 8 665, 792
s. 9 792
s. 10 676, 749, 793
s. 11 723, 793
ss. 12, 13 794
s. 14 794, 795
s. 15 795
ss. 16–18 796
ss. 19, 20 798
s. 21 755, 799
s. 22 21, 22, 799
s. 23 799
s. 24 21, 799, 1120
s. 25 800
s. 27 800, 802
s. 28 800
ss. 29, 30 801
s. 31 761, 801, 803
s. 32 801, 802
ss. 33–36 802
s. 37 754, 803, 807
ss. 38, 39 803
ss. 41, 42 804
s. 43 803, 804
s. 44 804
ss. 45, 46 805

PAGE
56 & 57 Vict. c. 71 (Sale of Goods Act, 1893)
ss. 47, 48 806, 914
s. 49 806
s. 50 807, 1312
s. 51 807, 1311
s. 52 807, 1155, 1169
s. 53 793, 808
s. 55 803
s. 57 803
s. 58 808
s. 61 791
s. 62 707, 790, 792, 793
s. 67 804
c. 73, s. 8 10, 99
s. 25 (2) 250
s. 26 249
s. 46 954
s. 48 1047
57 & 58 Vict. c. 15 247
c. 16 (Judicature Act, 1894)
s. 1 1035, 1343
s. 2 996
s. 3 1251
c. 19 1121
c. 24 237
c. 28 939, 1043
c. 41 61, 294, 311
c. 47 1032
c. 54, s. 1 1025, 1026, 1027
c. 57 94
c. 60 (Merchant Shipping Act, 1894)
s. 24 674
ss. 105–109 865
ss. 128, 129 863
s. 167 919
ss. 393–398 865
ss. 457, 459 314
s. 466 1043
s. 477 1043
ss. 502, 503 653
s. 541 385
s. 686 138
s. 687 137
s. 691 1105
c. ccxiii. 99
58 Vict. c. 9 1101
58 & 59 Vict. c. 24, ss. 1, 2 894
s. 4 892
c. 39 985, 1019, 1358
s. 4 323, 1041, 1354
s. 5 1354
c. 40 192
ss. 1, 2 180
59 & 60 Vict. c. 14 71
c. 19, s. 2 92
c. 25 1033
s. 33 938
c. 28, s. 38 1447
c. 35 1195
s. 2 1024
c. 36 98, 253

PAGE
59 & 60 Vict. c. 44, ss. 1–3 . . . 866
c. 56 237
c. 57 990
60 & 61 Vict. c. 37 . . . 869, 1375
c. 52 312
c. 65 (Land Transfer Act, 1897) . 1448
ss. 1–3 1257, 1392, 1397
61 & 62 Vict. c. 10, s. 16 . . . 1447
c. 29 . . . 253, 1033
s. 12 . . . 503
c. 36 (Criminal Evidence Act, 1898) 251
s. 1 . . 328, 1078, 1089, 1095–1098
s. 3 . . . 1078
s. 4 . . 328, 1097
s. 6 . . . 251
c. 39 . . 231, 234, 1097
c. 48 732
c. 49 246
c. 60, ss. 1, 2 . 230, 1062, 1118
62 & 63 Vict. c. 9, s. 11 . . . 943
c. 14 1047
s. 5 . . . 99
Sched. II. . . 99
c. 15 99
c. 22 . . . 366, 985, 1050, 1052
s. 3 . . . 368
c. 23, ss. 13–16 . . 374
c. 33 94
c. 51 504
63 & 64 Vict. c. 22 869
c. 33 235
c. 51, s. 1 . 718, 731, 1152
1 Edw. VII. c. 10 . . . 350, 363
c. 22 . . . 314, 866, 1033
2 Edw. VII. c. 6 237
c. 8, s. 8 . . 205, 246
c. 28, s. 5 . 231, 1042, 1354
c. 42, s. 17 . . . 99
3 Edw. VII. c. 18, ss. 4, 5 . 314, 315
c. 31 93
c. 36 253
s. 1 . . . 253
s. 9 . . 253, 1100
c. 38 . . . 1056, 1121
s. 1 . 1056, 1057, 1059
ss. 2, 3 . . 1057
c. 42 1337
s. 3 . 1031, 1149, 1280
c. 45 98
4 Edw. VII. c. 4 237
c. 10 237
c. 15 . . . 61, 294, 1097
s. 27 . . 330, 1047
s. 28 . . . 318
c. 19, s. 2 . . . 1026
c. 23, s. 3 . . . 888
Sched. II. . . 888

PAGE
5 Edw. VII. c. 1 . . . . . 253, 503
c. 13 1433
s. 1 . . . 233
s. 3 . . 233, 1118
s. 7 . . 233, 1118
c. 15 (Trade Marks Act, 1905) . . 610
s. 3 . . . 611
s. 4 . . 611, 613
s. 8 . . . 611
s. 9 . . . 612
s. 11 . . 612, 614
s. 19 . . . 612
ss. 22, 39, 40, 42 . 613
6 Edw. VII. c. 16 986
s. 3 . . . 1447
c. 17 . . . 469, 810
ss. 76–82 . . 828
c. 24, s. 1 . . . 1445
c. 27, s. 6 . . . 374
c. 28, s. 5 . . . 880
c. 32, s. 1 . . . 510, 1041
c. 34 . . 191, 364, 734, 849
s. 1 . . . 365
s. 2 . . 365, 991, 1122
c. 41 (Marine Insurance Act, 1906) . . 1467
s. 1 . . . 931
s. 4 . . 931, 932
ss. 5, 6 . . 931
ss. 10–12, 14 . 931
s. 17 . . . 932
s. 18 . . 932, 933
s. 20 . . . 932
ss. 21, 22 . . 933
s. 23 . . 931, 933
ss. 27, 29 . . 934
ss. 33, 34, 37, 39–42 . . . 935
ss. 45, 46, 48, 49 . 935
ss. 50, 51 . . 934
ss. 55–57, 60–62 . 936
s. 63 . . . 937
s. 64 . . . 918, 937
s. 65 . . 917, 937
s. 66 . . 918, 937
s. 79 . . . 937
s. 84 . . . 933
c. 43, s. 1 . . . 247
c. 47 (Trade Disputes Act, 1906) 563, 628, 1423
s. 1 . . 563, 632
s. 2 . . 506, 632
s. 3 . . 563, 632
s. 4 . . 73, 633, 1424
s. 5 . . 261, 563, 633
c. 53 . . . 939, 1043
c. 55 . . . 1410

PAGE
6 Edw. VII. c. 58 (Workmen's Compensation Act, 1906) . 197, 496, 869, 874, 944, 945, 1020, 1032, 1345, 1375
  s. 1 . . . 870
  s. 2 . . 870, 871
  s. 3 . . 731, 872
  ss. 4, 5 . . 873
  s. 8 . . . 870
  s. 13 . 437, 866, 870, 871, 1394
  Sched. I. . 870, 871, . 1348
  Sched. II. . 1348, 1378
  Sched. III. . . 870
7 Edw. VII. c. 4 . . . 94, 119
  c. 13, s. 8 . . . 928
  c. 16, s. 1 . . . 1101
  c. 17 (Probation of Offenders Act, 1907) . 140, 1115
    s. 1 . . 324, 1053, 1116, 1120
    s. 2 . . . 1117
  c. 23 (Criminal Appeal Act, 1907) . 984, 1441
    s. 1 . . 996, 997, 999, 1122, 1123
    s. 3 . . 996, 997, 1123
    s. 4 . . 997, 1124, 1125
    s. 5 . . . 1125
    s. 6 . . 141, 1120
    s. 7 . . . 1085
    s. 8 . . . 1126
    s. 9 . . 1126, 1127
    s. 10 . . . 1126
    s. 11 . . . 1124
    s. 13 . . . 1128
    s. 14 . 1122, 1124
    s. 15 . . . 1126
    s. 16 . . . 1126
    s. 19 . . 141, 1128
    s. 20 . . 984, 996, 997, 1070, 1122, 1123
    s. 23 . . . 1122
  c. 24, s. 7 . . . 857
  c. 29 (Patents Act, 1907) . . 598
    s. 1 . . 599, 601
    ss. 2, 4, 5–7, 11–14 . . 599
    s. 18 . . . 598
    s. 27 . . . 600
    s. 32 . . . 603
    s. 33 . . 598, 604
    s. 36 . . . 545
    ss. 78, 79 . . 601
  c. 31 246
  c. 32 . . . 92, 504
  c. 47 . . . 216, 1353
  c. 53, ss. 52–68 . . 246
    s. 81 . . . 226
  c. 54, s. 35 . . 905, 907
8 Edw. VII. c. 3 1045
  c. 7, s. 1 . . 495, 922
  c. 11 237
  c. 15, ss. 1, 4, 5 . . 1121
    s. 6 . . 140, 432, 1051, 1121
    s. 7 . . . 1121
    s. 9 . . . 1128
  c. 27 . . . . 1352, 1360, 1365
  c. 28 (Agricultural Holdings Act, 1908)
    s. 1 . . 905, 906
    s. 2 . . . 905
    ss. 3, 4 . . 906
    s. 5 . . . 731
    s. 6 . . 81, 906
    s. 9 . . . 905
    ss. 10, 11 . . 906
    s. 13 . . . 1021
    s. 21 . . 904, 906
    s. 22 . . . 901
    s. 23 . . 901, 906
    s. 25 . . . 889, 1259
    s. 26 . . . 883
    s. 28 . . . 890
    s. 29 . . . 893
    s. 31 . . . 890
    s. 42 . . 904, 905
    s. 48 . . . 905
    Sched. I. . . 905
  c. 36 1033
    s. 47 . . . 905
  c. 40 . . . 13
    s. 3 . . . 13
    s. 6 . 13, 731, 782
  c. 45, ss. 1, 2 . . 227
    s. 4 . . 991, 1097, 1122
  c. 46, s. 1 . . 996, 1122
  c. 47, ss. 1, 3 . . 1381
  c. 48 (Post Office Act, 1908)
    ss. 8, 9 . . 1101
    s. 16 . . . 230
    s. 45 . . . 1410
    s. 50 . . 334, 358
    s. 55 . . . 358
    s. 61 . . . 398
    s. 63 . 228, 314, 398
    s. 74 . . . 1101
  c. 51, s. 6 . . . 1019
  c. 53, s. 1 . . 890, 892
    s. 2 . . . 890
    s. 3 . . . 882
    s. 4 . . . 891
  c. 55 314
  c. 59 (Prevention of Crime Act, 1908) 1117, 1119
    s. 1 . . . 1117
    s. 6 . . . 1118
    s. 10 . 73, 139, 1062, 1089, 1119
    s. 11 . . . 1124
  c. 66 . 16, 161, 170, 474

PAGE
8 Edw. VII. c. 67 (Children Act, 1908) . 222, 291, 310, 312, 987, 1467
s. 1 923
s. 7 . . . 731, 923
s. 12 . 121, 268, 293, 310, 311, 1084, 1471
s. 13 311
s. 15 312
ss. 17, 18 . . . 223
s. 27 1097
s. 30 . . . 196, 1095, 1100
s. 32 1047
s. 35 1122
s. 37 318
ss. 102–106 . . . 1368
s. 107 . . . 1050, 1368
ss. 111, 112 . . . 1368
ss. 116, 117 . . . 385
s. 119 312
s. 128 . . 1050, 1051
c. 69 (Companies (Consolidation) Act, 1908) . 93, 1016, 1411, 1467
ss. 1–6 . . . 1411
ss. 7–9 . . . 1411, 1412
ss. 10–17 . . . 1412
s. 20 1411
s. 63 823
s. 69 1415
s. 76 . . . 673, 1420, 1421
s. 77 . . . 823, 837
s. 80 1412
s. 81 . . . 724, 1412
s. 82 . . . 1412, 1413
s. 83 1412
s. 84 . 554, 557, 558, 625, 721, 725, 1413, 1414
ss. 85, 86 . . . 1413
s. 87 . . . 1413, 1422
ss. 88–90 . . . 1413
s. 105 1169
s. 121 1411
ss. 122–130 . . . 1414
s. 131 . . . 1032, 1414
ss. 132–181 . . . 1414
ss. 182, 197, 199–204, 209 . . . 1415
s. 215 560
ss. 242, 267 . . . 1415
s. 268 . . . 858, 1415
ss. 269–274 . . . 1415
Part IV. . . . 1016
9 Edw. VII. c. 12 932
c. 44 880
ss. 14, 15 . . 882, 907
c. 49 . . . . 943, 946
s. 36 924

PAGE
10 Edw. VII. & 1 Geo. V. c. 20 . 94
c. 24 (Licensing (Consolidation) Act, 1910) . . 1467
ss. 2, 12, 20 . . 992
s. 77 224
c. 25, s. 1 223
c. 29 1425
1 & 2 Geo. V. c. 6 (Perjury Act, 1911). 1100, 1467
s. 1 . 193, 195, 196, 197, 199, 1478
s. 2 . . 194, 195, 197
s. 3 . . 194, 195, 1047
s. 5 195
s. 7 194
s. 8 . 137, 196, 197
s. 9 . 198, 1071, 1341
s. 10 195
s. 11 1122
s. 12 195
s. 13 199
s. 14 1108
s. 15 196
s. 16 197
c. 7 . . . 180, 192, 1047
c. 13 60
c. 16 13
s. 4 13
c. 27 (Protection of Animals Act, 1911) 234, 402, 1467
s. 1 . . . 235, 236
ss. 2, 3 . . . 236
ss. 5, 6 . . . 237
s. 7 . 237, 895, 968
ss. 9, 11 . . . 237
s. 12 480
s. 15 235
Sched. I. . . . 237
c. 28 (Official Secrets Act, 1911) 61, 152, 188
s. 1 152
s. 2 153
s. 3 152
s. 5 1084
s. 6 479
s. 9 1051
s. 10 137
c. 37, s. 2 1257
s. 7 1366
c. 38 . . . 718, 731, 1152
c. 46 (Copyright Act, 1911) 1467
s. 1 . 605, 606, 608
s. 2 . . . 606, 610
s. 3 605
s. 5 . . . 607, 608
s. 6 . . . 607, 609
s. 7 607
s. 8 . . . 607, 609
s. 9 607
s. 10 . . . 607, 1136
s. 11 607
ss. 21, 24 . . . 605

PAGE

- 1 & 2 Geo. V. c. 46 (Copyright Act, 1911)
  - ss. 29, 30 . . 605
  - s. 31 . . . 604
  - s. 35 . . . 606
  - c. 50 . . 314, 866, 1043
- 2 & 3 Geo. V. c. 10, s. 7 . . . 1097
  - c. 20, s. 1 . . . 480
    - s. 2 . . . 222
    - s. 3 . . 140, 222
    - s. 4 . . . 224
    - s. 5 . . 224, 895
    - s. 7 . . 140, 234
  - c. 29 1026
- 3 & 4 Geo. V. c. 7 1097
  - c. 27 (Forgery Act, 1913) 362, 386, 389, 1467
    - s. 1 . 387, 389, 828
    - s. 2 . . 388, 1472
    - s. 3 . . 194, 388
    - ss. 4, 5 . . 388
    - s. 6 . . 390, 1472
    - ss. 7–11 . . 391
    - s. 13 . . . 391
    - s. 14 . . 386, 1046
    - s. 15 . . . 391
    - s. 16 . . 391, 1051
    - s. 17 . . . 390
    - s. 18 . . . 388
  - c. 28 . 1053, 1382, 1385
    - ss. 2, 21, 27, 67 . 1383
  - c. 34, s. 15 . . . 469
- 4 & 5 Geo. V. c. 12 (Aliens Restriction Act, 1914) . 1433
  - c. 17 (British Nationality, &c., Act, 1914)
    - s. 1 . 1428, 1429
    - s. 5 . . . 1429
    - ss. 7, 7A, 10 . 1430
    - ss. 13, 14 . 143, 1430
    - s. 15 . . . 1430
    - s. 16 . . . 1431
  - c. 22 866
  - c. 58 (Criminal Justice Administration Act, 1914) . . . 985
    - ss. 1–5 . . 1053
    - ss. 7–9 . . 1117
    - s. 10 . . 991, 1124
    - s. 11 . 1117, 1118
    - s. 14 . . 402, 1049
    - s. 15 . . . 1050
    - s. 16 . . 369, 1115
    - s. 19–24 . . 1056
    - s. 28 . 196, 215, 1095, 1097
    - s. 36 . 140, 151, 1115
    - s. 37 . . 140, 988
    - s. 39 . . . 1072
  - c. 59 (Bankruptcy Act, 1914) . . 1399, 1467
    - ss. 1, 4 . . 1401
    - s. 5 . . . 1402
    - ss. 14, 16, 18 . 1403
    - s. 19 . 1013, 1404
    - s. 20 1012, 1403–1405
    - s. 21 . . . 1403

PAGE

- 4 & 5 Geo. V. c. 59 (Bankruptcy Act, 1914)
  - s. 22 . . . 1404
  - s. 26 . . . 1406
  - s. 28 . 1407, 1455
  - s. 30 . . . 1406
  - ss. 33–35 . . 1405
  - s. 36 . . . 1366
  - s. 37 . . . 1401
  - s. 38 . . 784, 1404
  - s. 45 . . . 781
  - s. 46 . . . 829
  - s. 48 . . . 1404
  - s. 52 . . . 1366
  - s. 54 . . 898, 904
  - s. 56 . . . 1405
  - s. 60 . . . 607
  - s. 62 . . . 1012
  - s. 96 . . 1010, 1032
  - s. 97 1010, 1011, 1032
  - s. 98 . . 1011, 1032
  - s. 99 . . 1032, 1401
  - ss. 100, 101 . 1032
  - s. 102 . . 1011, 1032
  - ss. 103–105 . . 1032
  - s. 108 . . 1011, 1013
  - s. 118 . . . 1405
  - s. 125 . . 1366, 1400
  - s. 127 . . . 858
  - s. 154 . . 378, 1469
  - s. 155 . 378, 1407, 1469
  - ss. 157, 158 . 379
  - s. 159 . . . 378
  - s. 164 . . 378, 1122
  - s. 167 . . . 1406
  - Sched. II. . . 1406
- 5 & 6 Geo. V. c. 90 (Indictments Act, 1915) 160, 320, 334, 356, 1061, 1067
  - ss. 1, 2 . . 1061
  - s. 3 . . 1061, 1062
  - s. 4 1063, 1064, 1074
  - s. 5. 381, 1064, 1072, 1073
  - s. 6 . . . 1065
  - s. 8 1061, 1067, 1071
  - Sched.. . . 1468
- 6 & 7 Geo. V. c. 14, s. 1 . . . 393
  - c. 50 (Larceny Act, 1916) . 61, 336, 363, 366, 1467
    - s. 1 337, 339, 344, 347, 348, 350, 351–353, 355
    - s. 2 . . 337, 1066
    - s. 3 . . . 337
    - s. 4 . . . 341
    - s. 5 . . . 342
    - ss. 6, 7 . . 337
    - s. 8 . . 337, 338
    - s. 9 . . . 357
    - s. 10 . . 339, 355
    - s. 11 . . . 337
    - s. 12 . . . 358
    - ss. 13–16 . . 357
    - s. 17 . 357, 359, 1471, 1474
    - s. 18 . . . 358

PAGE

6 & 7 Geo. V. c. 50 (Larceny Act, 1916)
 s. 20 . 198, 350, 360, 362, 363, 991, 1457, 1472, 1473
 s. 21 . . 361, 991
 s. 22 . . 362, 991
 s. 23 . 321, 331, 334, 1478
 s. 24 . . 214, 396
 s. 25 . . 392, 1470
 s. 26 . . . 395
 s. 27 . 214, 395, 396
 s. 28 . . . 396
 s. 29 . 182, 335, 1478
 s. 30 . . 183, 334
 s. 31 . . . 183
 s. 32 . . 366, 1471
 s. 33 . 138, 380, 382, 1066, 1473
 s. 35 . . . 358
 s. 36 . . . 346
 s. 37 . . . 1050
 s. 38 . 198, 364, 392, 990, 991
 s. 39 . . 382, 1046
 s. 40 . 381, 1064, 1065
 s. 41 . . . 479
 s. 42 . . . 1051
 s. 43 . 122, 384, 1089

PAGE

6 & 7 Geo. V. c. 50 (Larceny Act, 1916)
 s. 44 . 348, 356, 373, 1083, 1084
 s. 45 . . . 799
 s. 46 . . 361, 393
 c. 58 . . . 614, 617
 c. 64 . 191, 364, 734, 849
7 Geo. V. c. 4 (Grand Juries (Suspension) Act, 1917) 47, 1057, 1060
 s. 1 . 132, 1060, 1071
7 & 8 Geo. V. c. 48 . . . 810, 825
8 & 9 Geo. V. c. 14 870
 c. 23, s. 7 . . . 1039
 c. 38, s. 2 . . . 1428
 s. 3 . . . 1429
 c. 40, First Sched. . 888
9 & 10 Geo. V. c. 56 . . . 1458
 c. 62, s. 2 . . . 605
 c. 69, s. 8 . . 261, 563
 c. 71 (Sex Disqualification (Removal) Act, 1919) 1439, 1444
 c. 79 (Trade Marks Act, 1919) . . 598
 c. 80 (Patents and Designs Act, 1919) 610
 c. 92 . . 1118, 1433
 c. 102 (Old Age Pensions Act, 1919) . 13

ADDENDA ET CORRIGENDA.

Page	13, note 3.	Now see the Old Age Pensions Act, 1919 (9 & 10 Geo. V. c. 102).
,,	100, line 13.	"Ss. 39 and 45" *should be* "ss. 39—45."
,,	100, note 7.	"36 & 37 Vict. c. 7" *should be* "36 & 37 Vict. c. 71."
,,	191, ,, 1.	"[1914] 1 K. B. 1283" *should be* "[1914] 3 K. B. 1283."
,,	196, ,, 6.	"8 Edw. VII. c. 57" *should be* "8 Edw. VII. c. 67."
,,	225, ,, 6.	"5 Geo. V. c. 83" *should be* "5 Geo. IV. c. 83."
,,	598, ,, 5.	*Add* "as amended by the Patent and Designs Act, 1919 (9 & 10 Geo. V. c. 79)."
,,	610, ,, 8.	*Add* "as amended by the Trade Marks Act, 1919 (9 & 10 Geo. V. c. 80)."
,,	722, ,, 4.	"*Erle* v. *Kingscote*" *should be* "*Earle* v. *Kingscote*."
,,	892, ,, 6.	"*Hunt* v. *Morrell*" *should be* "*Hutt* v. *Morrell*."
,,	987, ,, 1.	"8 Edw. VII. c. 87" *should be* "8 Edw. VII. c. 67."
,,	999, ,, 1.	*Add* "*R.* v. *Beard* (1919), 14 Cr. App. Rep. 110 and 159 (H. L.), and [1920] W. N. 110 (H. L.)."
,,	1071, 3.	The date of the Law of Libel Amendment Act should be 1888.
,,	1090, ,, 3.	*For* "17 & 18 Vict. c. 125, s. 25" *read* "28 Vict. c. 18, s. 6."

[NOTE.—*Cases and Statutes have been indexed as if the above additions and corrections had been made in the body of the book.*]

ODGERS ON THE COMMON LAW.

BOOK I.

INTRODUCTION.

CHAPTER I.

RIGHTS AND DUTIES.

THERE are two kinds of law—the law of God and the law of the State. There is no other kind of law. Philosophers write about "the moral law." By this they mean man's imperfect conception of the law of God. Writers on Jurisprudence also use the phrase "moral law," but in an entirely different sense—namely, to denote the restrictions which are imposed on a man's conduct by the manners, customs and etiquettes of his tribe, caste, sect, profession, trade union or clique. But such restrictions are not laws at all. Neither God nor the State will punish a man who disregards them.

We often hear of "the customary law." But this is merely the name given to that portion of the law of any State which happens to have been custom before it became law. A custom is not of itself a law. Until the State chooses to adopt and enforce it, it is merely a rule which a man may follow or not as he pleases; it is not a law which he will be compelled to obey. Customs are not decreed by the State; they are the creations of habit and fashion; they are constantly changing,

> "Lest one good custom should corrupt the world."

The State may, if it chooses, adopt a custom and make it a law, and then, of course, it must be obeyed.

We also sometimes read of the "law of nature." Certain of the later Roman jurists bestowed this title upon that *jus gentium*, which the *prætor peregrinus* administered in his court and which Sir Henry Maine describes as "the sum of the common ingredients in the customs of the old Italian tribes."[1] But the *jus gentium* was part of the positive law of Rome; it differed, moreover, from the so-called "law of nature" in more than one important particular, as appears from the writings of these jurists themselves.[2] Again, when a lawless band of men, such as the mutineers of *The Bounty*, settle down in some uninhabited island outside the pale of civilisation, they are sometimes described as being governed by the "law of nature"—that is, surely, by the remnants of their consciences. So, too, our judges will refuse to enforce the decisions of a foreign Court, if they consider them contrary to "natural justice."

Sir W. Blackstone rightly defines the "law of nature" as the unrevealed law of God.[3] But he goes too far when he asserts that, "being coeval with mankind, it is superior in obligation to any other; . . . no human laws are of any validity, if contrary to this." We read also in *Calvin's Case*[4] that the "law of nature is part of the Laws of England." But this is not the fact: it is no part of the law of any State. Again, in *Forbes* v. *Cochrane*[5] Best, J., erroneously declares that if a "right sought to be enforced is inconsistent with either the law of nature or the revealed law of God, the English municipal Courts cannot recognise it." But surely the duty of our judges is to administer the law of England as they find it, whether they deem it consistent with the "law of nature" or not.

In these and all similar passages the phrase the "law of nature" means that "moral law" which we have already discussed—those intuitions of right and wrong of which we are all conscious. If not, what is this "law of nature"? Where is it to be found? How is it to be identified? Is it the same in Timbuctoo or Teheran as it is in London or New York? Or does it vary with the latitude of each place, or with the degree of civilisation there in vogue? Again, was it the same in the time of Samson or Theseus as it was in the days of Ulpian or John Bright? If not, then where are these variations recorded? As a matter of fact, there is not now and never was any such thing as a "law of nature" in any sense in which a practising lawyer of to-day understands the word "law." It is just a convenient and very elastic term which is sometimes used as identical with the law of God or conscience, or "natural justice," while at other times it seems to denote little more than savage customs or animal instincts.[1]

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[1] Maine's Ancient Law, with notes by Sir F. Pollock, pp. 52, 53.

[2] See the passages cited in the Institutes of Justinian, I. 2 pr., and I. 3, 2.

[3] St. Paul makes the same distinction between the voice of nature and the written law of God in the second Chapter of his Epistle to the Romans: "When the Gentiles, which have not the law, do by nature the things contained in the law, these . . . . are a law unto themselves, which shew the law written in their hearts, their conscience also bearing witness . . . ." (vv. 14, 15).

[4] (1608) 7 Rep. at p. 4b.

[5] (1824) 2 B. & C. at p. 471.

For us, then, there are but two kinds of law—the law of God and the law of the State. Henceforward in this book by the word "law" will be meant the law of the State.

A State may be roughly defined as a political community which governs itself. It governs itself by means of laws. It is essential to the welfare of the community that in every State there should exist an authoritative body of law, readily accessible, easily intelligible, and strictly and impartially enforced. This body of law should comprise all rules, whether customary or written, which have been laid down for the guidance of the community and to which its members, if they would avoid penal consequences or civil liability, must necessarily conform.[2] It should have lucid expression and scientific arrangement. Its provisions should be clear and certain and such as can be easily understood by those who have to obey them.

A law, then, is a rule of conduct which the State prescribes and enforces on its subjects.

Different States have different laws; and even in the same

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[1] Just. Inst. I. 2; Dig. I. 1. 1. 3.

[2] These penal consequences and civil liabilities are called by writers on jurisprudence the "sanctions" of the law, because they think that, without them, the law would not be binding on the subjects of the State—in other words would not be law at all.

State different bodies of law may co-exist. Thus in the British Empire there are more than fifty different legal systems administered in our various Law Courts. In different States, too, the power of making laws is vested in different persons or bodies of persons. In strict monarchies this power resides in the King alone. But in early times the King, who was, as a rule, merely a successful soldier with a strong will of his own, generally sought advice and assistance in his law-making from the great men of his realm. A committee of Nobles or Notables was thus formed, which soon was permitted to usurp legislative functions and organised itself into a Great Council or Senate. Later on the common people began to make its wishes felt; it purchased redress of its grievances with blood or money, and subsequently acquired some voice in the making of the laws to which it had to submit. Eventually in most countries certain classes of the people obtained direct representation in the legislative chamber.

A State may thus be a monarchy, an aristocracy or a democracy. In England we have a curious medley of all three. Yet the will of the people ultimately prevails, whenever the people has a will and cares to make it felt. Hence more and more every year the tendency of our legislation is, without either advancing or injuring the special interests of any particular class, to assert, maintain and promote the overriding claims of the community as a whole.

Every law is made by the State, either directly or indirectly. The sovereign legislature (be it one person or many) may, and usually does, confer on inferior bodies power to make laws, *e.g.*, a county council or town council may make bylaws, the Board of Trade may issue orders, &c.[1]

Rights and duties, wrongs and remedies, are the subject-matter of law. Laws create rights and impose duties. Every right involves a corresponding duty in others; and to nearly every duty there is a corresponding right. Rights are always conferred, and duties are always imposed, on "persons"—a term which includes, in addition to human beings, certain artificial bodies, which the State recognises as persons, such, for instance, as corporations. Every violation of a right, every neglect or breach of duty, is a wrong for which the State, as a rule, provides a remedy.[1]

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[1] See *post*, pp. 91—101.

Rights are of two classes. Some are absolute rights, which every one within the realm possesses, be he prince or pauper, British subject or alien. These may be called public rights, as every member of the public possesses them.[2] Others are rights enjoyed only by individuals, who happen to own certain property, to hold a certain office or to have entered into a special contract, &c. These are called private rights. They are of infinite variety; but the great majority of them relate to property. Rights of property are of four kinds :—

(i.) A right to the exclusive enjoyment of land, or of a thing—a right to have it and use it and dispose of it as one's own. This is ownership or dominion (*jus in rem*).

(ii.) A right to seize, or hold, or use, or enjoy, land or a thing which belongs to another person (*jus in re alienâ*).

(iii.) A right against a person merely; a right to make him hand over to you land or money or some thing (*jus in personam*).[3]

(iv.) There is a fourth class of rights which is growing more and more important every day.[4] It includes the exclusive right to manufacture and use a particular invention, the exclusive right to make copies of a book, poem, play, picture or design, and the exclusive right to attach to goods a particular trade mark, or to prevent any one else from selling goods under a name well known in the trade. All these acts may be innocent in themselves, but they become wrongful whenever the law has given to another person the sole right to do these acts. Such rights are clearly a kind of property.[5]

There are other rights known to the law, which are not rights of property.

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[1] "Semble que toutes fois ou on a aucun tort ou damage, la ley done a luy un remedy, et ceo per voye daccion." Year Book 12 Hen. VIII. (A.D. 1520), p. 3.

[2] These are discussed in the next chapter.

[3] These rights of property are discussed in Chapters III., IV. and V., *post*, pp. 17—38.

[4] See Infringement of Patents, Copyrights, &c., *post*, pp. 597—622.

[5] *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, 153.

(v.) A right attaching to an office, and personal to the present holder of that office and to him alone. Thus a judge, sheriff, mayor or policeman has rights which a private citizen does not possess.

(vi.) A right arising out of family or other relationship. Thus parent and child, husband and wife, guardian and ward, have mutual rights, which are discussed under the Law of Persons.[1]

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[1] Book VI., pp. 1351 *et seq.*

Chapter II.

PUBLIC RIGHTS.

Under this term we group those absolute rights which every one in the realm possesses—which do not depend upon the ownership of property, or the tenure of any office, or the existence of any contract between the parties. First among these stands the right of personal security.

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation, to each of which he has a natural inherent right, which cannot be wantonly destroyed, infringed or restricted without a manifest breach of civil liberty."[1] Every citizen enjoys the right of personal liberty; he is entitled to stay at home or walk abroad at his pleasure without interference or restraint from others. Any confinement or detention, for which no legal justification can be shown, is a "false imprisonment."

Ancillary to the right of personal security is the right of self-defence. Every man may repel unlawful force by force; and this whether such unlawful force be directed against himself or against his wife, child or servant, and probably if it be directed against any weak or helpless stranger.

Again, every one who is inside a house is entitled to use force to prevent the forcible entry into that house of any one who has no right to enter it. "Every man's house is his castle." This right is not confined to the occupier of the house or even to his family or servants. Any stranger, who is lawfully present in the house, may exercise this right.

And even where no attack is being made upon a man or upon his wife, child or servant, still he may always interfere to prevent any one from committing treason or any felony, or any act which would manifestly endanger another's life, or any breach of the peace, and hold the offender until he desists from his criminal attempt.[1] Then, in the case at all events of a breach of the peace, he must release him; he is not entitled to detain him after the affray is over, unless he holds a warrant from a justice authorising him so to do.

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[1] 1 Bla. Com. 129.

Again, every man has an absolute right to have his reputation preserved inviolate. Any actual disparagement of his good name is a wrong for which civil proceedings, and sometimes even criminal proceedings, will lie. A man's livelihood often depends on his reputation. Hence words, which on the face of them must injure the reputation of the person to whom they refer, are clearly defamatory and, if false, are actionable without proof that any particular damage has followed from their use. Words, on the other hand, which merely might tend to injure the reputation of another are *primâ facie* not defamatory, and even though false are not actionable, unless as a matter of fact some appreciable injury has followed from their use.

Every one has a right to comment on matters of public interest and general concern, provided that he does so fairly and with an honest purpose. This right is in no way the special privilege of the Press; every citizen has full freedom to speak and to write on such matters. Such comments are not libellous, however severe in their terms, so long as the writer truly states his real opinion of the matter on which he comments, and does not assert as a fact that which is untrue.[2] This right is a very wide one. Every man may discuss fully and fearlessly every matter of public concern in the State; he may comment on any proposed legislation and on the public conduct of any public man; he may criticise freely any published book, or poem, any play, picture or statue publicly performed or exhibited, or any public concert or entertainment.

Every person within the realm, whether a British subject or not, has a right to pass and repass along every highway in the British Isles. He has a right to walk along every footpath; he has also a right to ride along every bridlepath, to drive cattle along every driftway, and to drive a cart or carriage along every high road, whether it be a main road or not. Our law presumes that every one of these various highways was voluntarily dedicated to the use of the public for ever by the owner of the land across which it runs; but this presumption is often contrary to the facts.[1] The most ancient of these high roads were constructed for military purposes by the Romans during their occupation of this island. Others came into existence simply by the tread of many feet, passing along an accustomed track from one village to another, in the days when the country was very sparsely populated and the land between the villages was common property or practically belonged to no one. These country paths were later improved and widened into roads by some county magnate or by the vestry of some parish; and it is now the duty of various highway authorities to maintain these roads and keep them in repair, and to remove all obstructions to the rights of the public.[2]

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[1] *Handcock* v. *Baker* (1800), 2 Bos. & Pul. 260.

[2] *Merivale and wife* v. *Carson* (1887), 20 Q. B. D. 275.

But the right of the public is merely to pass and repass along the highway, pausing only for such time as is reasonable and usual when persons are using a highway as such. No one has a right to stand still on the highway in order to shoot at pheasants flying over his head as they cross from covert to covert.[3] He may walk up and down on the road either for business or pleasure, but not with the object of maliciously interfering with the rights of others.[4]

The right of the public extends over the whole width of the highway, and not merely over the part which is metalled or trodden down.[5] This is so whether the highway in question be a carriage road or only a bridlepath or footway.[6] Thus, where an electric telegraph company without legal authority erected telegraph poles in a permanent manner on the waste at the side of a highway, leaving room enough for the use of the highway, and not affecting either the metalled road or the footpath by the side of it, this was held to be a public nuisance because the company had thus obstructed a small portion of space which the public had a legal right to use.[1]

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[1] See *Farquhar* v. *Newbury R. D. C.*, [1909] 1 Ch. 12; *Folkestone Corp.* v. *Brockman*, [1914] A. C. 338.

[2] See *post*, pp. 247—250.

[3] *R.* v. *Pratt* (1855), 4 E. & B. 860; and see *Fitzhardinge* v. *Purcell*, [1908] 2 Ch. at p. 168.

[4] See *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142.

[5] *Fowler* v. *Sanders* (1618), Cro. Eliz. 446.

[6] *Pullin* v. *Deffel* (1891), 64 L. T. 134.

The person dedicating may confer on the public the right to use the way as a footway, bridlepath or driftway only, and not as a carriageway.[2] He may also by contemporaneous acts limit the user of the way to certain times or seasons (*e.g.*, he may grant the public the right to use his bridge whenever it is dangerous to cross by the ford).[3] Or he may reserve to himself the right to periodically plough up the soil of the way.[4] But though he may thus restrict the user, he may not limit the number of persons who may use the way (*e.g.*, a dedication to the inhabitants of a parish or to any other limited portion of the public is void and confers no right on any one,[5] though such a right may be created by grant or, it is said, by custom).[6] Nor can a dedication be limited in respect of the duration of the right; every dedication is necessarily in perpetuity. And, in the absence of statutory authority, no dedication can be made subject to the payment of a toll.[7]

But the right of the public over a particular way, when once acquired, is permanent. The public cannot take by grant, nor can they grant away, such a public right. It cannot be lost by abandonment or non-user; the public retain the right though they may not have occasion to exercise it. It may, it is true, be extinguished by Act of Parliament. And now[8] two justices may, at the instance of either a district or a parish council, and with the prior consent of both bodies, and after certain formalities and certain advertisements,[9] stop a highway or divert it from its accustomed track to a new route. But the only ground on which a highway can be stopped is that it is unnecessary; the only ground on which a highway can be diverted is that the proposed new way is "nearer or more commodious" than the existing way; otherwise the rule is: "Once a highway, always a highway." The rights of the public remain in perpetuity.

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[1] *R.* v. *United Kingdom Telegraph Co.* (1862), 3 F. & F. 73.

[2] See *Sheringham U. D. C.* v. *Halsey* (1904), 68 J. P. 395.

[3] *R.* v. *Inhabitants of Northampton* (1814), 2 M. & S. 262.

[4] *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26; *Arnold* v. *Blaker* (1871), L. R. 6 Q. B. 433; *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96. And see *Gingell, &c. Ltd.* v. *Stepney Borough Council,* [1908] 1 K. B. 115; [1909] A. C. 245.

[5] *Vestry of Bermondsey* v. *Brown* (1865), L. R. 1 Eq. 204.

[6] Co. Litt. 56 a, 110 b.

[7] *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750.

[8] Ss. 84—92 of the Highway Act, 1835 (5 & 6 Will. IV., c. 50), as amended by the L. G. Acts, 1888 and 1894.

[9] See Odgers on Local Government, 2nd ed., pp. 168, 169.

A navigable river is a public highway as far as the ebb and flow of the tide extends. If the course of such a river be changed by the act of God, the right of the public is *ipso facto* diverted into the new channel.

Every one has the right to fish in the high sea and within the territorial waters of his own State, and also to fish in any tidal waters, such as a creek of the sea, or an estuary of a river so far up it as the ebb and flow of the tide reaches. But the right of the public to fish in a creek of the sea or estuary of a river will be excluded, if some subject shows that the exclusive right to fish therein is vested in him either by grant from the Crown or by prescription. And in most places where the right of fishing is valuable, the public generally find that an exclusive right of fishing is vested in the lord of some manor or the corporation of some adjoining borough.

"Every man has a natural right to enjoy the air pure and free from noxious smells or vapours and any one, who sends on his neighbour's land that which makes the air impure, is guilty of a nuisance."[1] Hence, the owner of a chemical factory can be restrained from poisoning the air with fumes of sulphur or alkali by any of his neighbours to whom such fumes are a nuisance; and a tramway company can be restrained from using creosoted wood blocks, the fumes of which kill the trees and flowers in the adjoining gardens.[2] But no one has a right to the access of the open air to his land across his neighbour's land.[3] Thus the owner of a windmill cannot prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, though the mill has been worked thus for over twenty years.[4] So no man has a right to have the view or prospect from his house preserved for his enjoyment; the owners of the adjoining land are entitled to build so as to block it out, provided they do not materially interfere with the access of light to his ancient windows.[5]

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[1] *Per* Lopes, L. J., in *Chastey* v. *Ackland,* [1895] 2 Ch. at p. 396.

[2] *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14.

[3] But a man may by long-continued user acquire a right to the access of air along "some definite channel constructed for the purpose of containing and communicating it." *Per* Lopes, L. J., in *Chastey* v. *Ackland,* [1895] 2 Ch. at p. 397.

[4] *Webb* v. *Bird* (1862), 13 C. B. N. S. 841.

[5] See *post*, p. 571.

Again, whenever legal proceedings are commenced against a man which may affect either his person or pocket, he has an absolute right to be heard in his defence. He cannot be condemned unheard. "It is implied by natural justice in the construction of all law that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself."[1] "No man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."[2] If, however, he had clear notice of the proceedings and was given an opportunity of urging his defence, and yet deliberately chose to stay away and say nothing, this right is forfeited and the proceedings may continue in his absence.

Our Law Courts are open to every one who honestly believes that he has any grievance or ground of complaint, but there are many cases in which an action will lie against a man who puts the law in motion against another maliciously and without reasonable and probable cause.[3] Every British subject has also the right to petition the King through the Home Secretary.[4]

Every man has a right to be baptised, and to have his child baptised, in the parish church of the parish in which he lives; and this, as a rule, without payment of any fee.[5]

Every man has the right to be married in the church of the parish in which either he or his intended wife resides, provided both have been baptised and provided banns have been duly published there, or he has procured a licence to be married there from the archbishop.[6] And this without paying any fee to the incumbent, unless a right to a fee has been given him either by a local custom [1] or by statute. Where there is such a custom, the fee must be of a fixed and reasonable amount. In no case, it seems, can the incumbent insist upon receiving the fee before he performs the ceremony.

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[1] *Per* Lord Denman, C. J., in *R.* v. *Wilson* (1835), 3 A. & E. at p. 826.

[2] *Per* Kelly, C. B., in *Wood* v. *Woad* (1874), L. R. 9 Ex. at p. 196.

[3] One instance of the application of this general principle is found in the action for malicious prosecution; another in the action for malicious arrest.

[4] Bill of Rights, 1688 (1 Will. & Mary, Sess. 2, c. 2).

[5] 35 & 36 Vict. c. 36, s. 1.

[6] 4 Geo. IV., c. 76, ss. 20, 22.

And now, by virtue of the Old Age Pensions Acts, 1908 and 1911,[2] every British subject, male or female, who has attained the age of seventy years, if he or she has been a British subject, natural born or naturalised, for at least twenty years, and has resided in the United Kingdom for at least twelve of those years, and is not in receipt of an income amounting to 31*l*. 10*s*. a year, is entitled while in the United Kingdom to receive for the rest of his or her life from the State a pension varying according to the amount of the recipient's income, so as to bring that income just over 13*s*. a week. Thus, a person whose income does not exceed 21*l*. a year will be entitled to a pension of 5*s*. a week, which may bring his total income up to 34*l*. a year; while a person whose income exceeds 28*l*. 17*s*. 6*d*. but is under 31*l*. 10*s*. is entitled to receive a pension of 1*s*. a week only, which will make his total income over 31*l*. 9*s*. 6*d*. a year, but not more than 34*l*. 2*s*. a year. The scale of pension between the above two extremes varies in the manner set out in the schedule to the Act of 1908.[3]

The applicant will be disqualified from receiving any such pension if he or she has been convicted of certain offences, and in some cases also by the receipt of parochial relief.[4] The right to a pension is inalienable by any act of the recipient. Any assignment of it or charge on it or any agreement to assign or charge it is declared void; and on the bankruptcy of a pensioner the pension will not pass to the trustee or any other person acting on behalf of the creditors.[5]

Lastly, every person dying in England is entitled to Christian burial, unless he died by his own hand,[6] or was unbaptised or excommunicate. He is entitled to be buried in consecrated ground, whether he was a member of the Church of England, a Roman Catholic, or a Dissenter. And whether he is a parishioner or not, he is entitled to be buried in the churchyard of the parish in which he died, if there be room there. If a parishioner of one parish die in another, he may be brought back to his own parish, if his relatives wish it, and buried there in the churchyard of his own parish church.

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[1] *Bryant* v. *Foot* (1868), L. R. 3 Q. B. 497. In this case the fee which was claimed (13*s*.) was held to be exorbitant.

[2] 8 Edw. VII., c. 40; 1 & 2 Geo. V., c. 16.

[3] Owing to the present high cost of living, half a crown a week has been added to each pension, and indeed the whole scale is now under review.

[4] Other disqualifications are mentioned in s. 3 of the Act of 1908, and in s. 4 of the Act of 1911.

[5] 8 Edw. VII., c. 40, s. 6.

[6] See the Interments (*felo de se*) Act, 1882 (45 & 46 Vict. c. 19).

There are, however, some rights which the public are popularly supposed to possess, but which are unknown to the law. The public have no right to walk anywhere they please over a common.[1] There may be a public right of way across a common along a defined track; but if so, the public have no right to stray out of the way over the common. The common is the property of the lord of the manor subject to the rights of the commoners, and may by consent of all these persons be enclosed, except the track along which runs the public right of way.

The foreshore of the sea or of a tidal river is that portion of the sea-beach or bed of the river which lies between high and low water mark. It is *primâ facie* the property of the Crown, but it may be the property of a private individual, if he can prove either a grant from the Crown or an ancient or modern user from which a grant can be inferred. In either case the foreshore is not a highway and the public have no right to walk over it, except in order to get to the sea for the purpose of navigation or of fishing. No member of the public has a right to walk over the foreshore for amusement or in order to get to the sea for the purpose of bathing. If he does so, he is technically a trespasser.[2] "The sands on the seashore are not to be regarded as, in the full sense of the word, a highway. . . . The plaintiffs have, therefore, *primâ facie* a right to treat every bather, every nursemaid with a perambulator, every boy riding a donkey and every preacher on the shore at Llandudno as a trespasser."[1] Again, the public have no right to gather seaweed[2] or gravel or stones[3] from the foreshore.

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[1] See the remarks of Farwell, J., in *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. at p. 198.

[2] *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; *Brinkman* v. *Matley*, [1904] 2 Ch. 313.

When the foreshore is covered with water, the public have a right of navigation over it and as incident to that right may anchor in the ordinary mode of navigation. They may not fix moorings in the soil for the purpose of anchoring; but fishermen and others, who frequent a particular place, may fix such moorings and anchor thereto, if they can show an immemorial custom so to do.[4] The public may also fish over a foreshore when it is covered by the sea, unless the Crown by grant prior to Magna Carta has granted, or by reason of immemorial custom is presumed to have granted, a universal right of fishing (called a "several fishery") to some particular individual.[5]

Again, the public often consider that there exists a right of public meeting. But no such right is recognised either by the statute or the common law of England in the wide sense in which the right is sometimes claimed, namely, that the public may meet wherever and whenever they choose. The public have no right to hold public meetings on private property. Thus in strict law there is no right in the public to hold public meetings on the seashore, which is private property.[6] Even in Hyde Park there is no absolute right to hold a public meeting, except with the permission of the Crown as defined by the Rules of the Park under the Parks Regulation Act, 1872.[7] And this Act applies to most of the public parks in or adjacent to London.[8] The so-called right of public meeting is simply the logical result of the view taken by the Courts that as one man may go to a public place to speak with another, so a hundred men can do the same thing. But in so doing they must not commit any trespass, cause any obstruction to a highway or so conduct themselves as to become an unlawful assembly.

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[1] *Per* Cozens-Hardy, J., in *Llandudno U. D. C.* v. *Woods*, [1899] **2** Ch. at p. 709.
[2] *Healy* v. *Thorne* (1870), Ir. R. 4 C. L. 395.
[3] *Scratton* v. *Brown* (1824), 4 B. & C. 485.
[4] *Att.-Gen.* v. *Wright*, [1897] 2 Q. B. 318.
[5] *Mayor of Orford* v. *Richardson* (1791), 4 T. R. 437; *Chad* v. *Tilsed* (1821), 2 B. & B. 403.
[6] *Brighton Corporation* v. *Packham* (1908), 72 J. P. 318.
[7] 35 & 36 Vict. c. 15; and see *Bailey* v. *Williamson* (1873), L. R. 8 Q. B. 118.
[8] With regard to Trafalgar Square, see *Ex parte Lewis* (1888), 21 Q. B. D. 191.

"There is no doubt that the people of this country have a perfect right to meet for the purpose of stating what are, or even what they consider to be, their grievances. That right they always have had, and I trust always will have; but in order to transmit that right unimpaired to posterity, it is necessary that it should be regulated by law and restrained by reason."[1] "The people of this country are undoubtedly entitled to assemble in a peaceable manner for the real and *bonâ fide* purpose of discussing any subject of interest, not having itself any criminal tendency, or for the purpose of preparing proper and respectful petitions to Her Majesty or to either House of Parliament, and such meetings, having really such objects, being peaceably and quietly conducted, cannot be said to be unlawful and riotous.[2] Whether any particular meeting be of a lawful or unlawful description must depend on the circumstances under which it is held, the manner in which it is brought together and the conduct of those who attend it."[3]

From these absolute rights flow corresponding duties, equally absolute, for it is the duty of every one to pay full regard to the rights of others, and to give to every one else what is legally his due.

It is the duty of every citizen to assist in the administration of justice, to interfere personally to prevent any breach of the peace, to aid in the detection of crime and in the capture of criminals, to attend as a witness to give evidence, to serve on all juries to which he is properly summoned, and to find true verdicts in any proceedings, civil or criminal, or on a coroner's inquisition.

Again, every householder in whose house a dead body is lying is bound at common law to have it decently interred, if no one else comes forward to undertake the duty. Dead bodies cast up by the sea or any navigable river, or floating or sunken in any such waters, if unclaimed by their relatives, must be buried by the churchwardens and overseers of the parish in which they are found in the churchyard and at the expense of that parish.[4]

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[1] *Per* Alderson, B., in his charge to the grand jury in *R.* v. *Vincent* (1839), 9 C. & P. 91.

[2] Order at such a meeting is protected by the Public Meeting Act, 1908 (8 Edw. VII., c. 66).

[3] *Per* Patteson, J., in his charge to a Middlesex grand jury in 1848. See Unlawful Assembly, *post*, p. 160.

[4] Burial of Drowned Persons Acts, 1808 and 1886 (48 Geo. III., c. 75; 49 Vict. c. 20).

CHAPTER III.

PRIVATE RIGHTS: RIGHTS OF OWNERSHIP.

WE now proceed to describe private rights, and in the first place rights of property. Property consists of land or things, or rights in, to, or over land or things; rights against persons are also, in a sense, property. Land and things are tangible property. Rights in, to or over them are intangible property, and so are rights against persons. Trees and growing crops, and all buildings erected on land, are part of the land and pass with it on any transfer of ownership. But timber, hay and corn that is cut, are things.

Ownership is the right to hold, use and enjoy land or things to the exclusion of every one else.

Ownership of things is older than ownership of land. No one owns the open sea: so it was formerly with the open country. But the primitive man recognised ownership in weapons and tools, in game killed or captured by the weapons, and in things fashioned by the tools.[1] Then when men gathered into towns, each family came to own its house; each family, too, had its burial ground; but the land around the towns or burial places was the common property of the tribe. This was still largely the case in England even in Saxon times. Then the tribe became a nation, and the land of the tribe became the land of the King, and later of his grantee, the lord of the manor. And now all land in England is the private property of somebody—of the King, if no one else can show a better title to it.

The King has, indeed, certain rights over all the land in the kingdom. These rights are rarely of any importance;[2] they are but the shadowy survivals of the fact that all the land in the country once belonged to the State. The existence of these royal rights, however, renders it technically inaccurate to say that any subject owns land. The King is the only absolute owner of land in this country. Even a tenant in fee simple has only an "estate" in his freehold land; but this practically amounts to ownership.

Gradually ownership came to involve further rights: the right to alienate or dispose of the property while the owner was alive, and later the right to fix who should own it after his death; and now it is the law in England that a man can bequeath by will the whole of his property, land or things, to a stranger, making no provision for his widow or children.

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[1] He may also be said to have regarded his wife and children as his property.

[2] The right of escheat is sometimes of considerable value.

In a few cases, however, restrictions are placed by the law upon the very wide power which individuals possess of disposing of their property. A man, for instance, cannot alter the usual common law line of descent by a creation of his own.[1] He cannot give an estate in fee simple to a person and his heirs on the maternal side, because the law has already said how a fee simple estate should descend; and even "the Crown cannot give to a grant of a dignity or honour a quality of descent unknown to the law."[2] Again, the law will not allow any one to attach any condition to property which is against the public good. Thus, a condition annexed to a devise of arable land that the devisee should not cultivate it is void, because it is against the prosperity of the country. Even upon the power of disposition by settlement in the lifetime of the settlor the law imposes such limits and restraints as are required by considerations of the public good; such, for instance, as the rule against perpetuities, which applies both to land and things and to wills as well as to settlements, and which insists upon the property being vested in some person as its absolute and unfettered owner within a certain period, namely, within the lifetime of specified persons who are in being at the date of the will or settlement, and twenty-one years after the death of the survivor of them.

Ownership also involves duties. The owner of any property is bound so to use and keep it that it will not be a nuisance to his neighbours; and all persons are bound to respect the owner's rights, and to do nothing to violate or infringe them. Rights of ownership both in land and things have been jealously guarded by enactment from Magna Carta downwards; and although there are cases in which, for the benefit of the community as a whole, the rights of property must be disregarded, such invasion of them is never sanctioned without due inquiry, and when it is permitted, compensation is granted to the owner of the property taken.

Ownership may be limited in point of time. A man may own land for life, or in tail, or in fee simple: he may own things for life, or absolutely. An estate in fee simple is the largest estate which a subject can have in land; it is acquired by a grant to him "and his heirs," or to him "in fee simple."[1] On his death it descends to his heir, unless he has sold it or willed it away. An estate in tail is an anomalous species of limited ownership. It arises where an owner in fee simple grants the land "to A. and the heirs of his body;" sometimes to "the heirs male" or "the heirs female" of his body. This estate lasts so long only as there are lineal descendants of A. of the specified kind in existence. But—strange to say—A., or any descendant of his who is in possession of the estate tail, is permitted to convert it into an estate in fee simple, and can then sell it away from his children. This is called "barring the entail."

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[1] *Per* Lord St. Leonards in *Egerton* v. *Earl Brownlow* (1853), 4 H. L. Cas. at p. 241.

[2] *Per* Lord Cairns, L. C., in *The Buckhurst Peerage Case* (1876), 2 App. Cas. at p. 21.

Ownership is something quite distinct from possession. Ownership is a question of title, a matter of law; possession is a matter of physical fact, as obvious to a layman as to a lawyer. A man is in possession of land or of a thing whenever he has full and uncontrolled physical dominion over it, whether such possession be in law rightful or wrongful, whether it commenced yesterday or twenty years ago. Thus, he is in possession of a house when he or his servants are living in it; if he or they are absent from it, he would still be in possession if such absence was only temporary, and if he could return and re-enter at any moment without asking any one's leave and without any preliminary ceremony. But as soon as any one else enters into and remains on the premises, the former possessor is ousted; for two persons cannot be in possession of the same property at the same time, unless they be partners or co-owners. A servant, however, is not deemed to be in possession of the things which he holds and uses on behalf of his master; he has merely the custody of them; his master has the possession.[2]

Primâ facie an owner is always entitled to possession of his property; he may take possession of it wherever he finds it, so long as he can do so peaceably.[3] But it may be that he is out of possession rightfully and by his own act—*e.g.*, if he has let the land to a tenant, or lent the thing to a friend. Or he may be wrongfully out of possession, *e.g.*, if he has been ousted from the land by a trespasser, or if the thing has been stolen. In either case he remains the owner: the hirer or borrower is only entitled to hold it for the period agreed on: the trespasser or thief has no rights at all.

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[1] See *In re Ethel*, [1901] 1 Ch. 945.

[2] It will be noticed that possession in English law differs greatly from the Roman *possessio*; it includes indeed many cases which Roman lawyers would have classed under the head of *detentio*.

[3] See Self-Help, *post*, pp. 961—970.

But he will not remain the owner if he stays out of possession too long. In order that titles may be clear and that lawsuits may end, most States decree that long-continued possession, even though wrongful in its inception, shall eventually confer ownership on the person in possession. The delay of the true owner who does not assert his rights will after a certain length of time vest a title in the possessor. This is called prescription.

Ownership of land in England, then, can be acquired in three ways:—

(i.) By transfer by or from the living owner.

(ii.) By succession on the death of the former owner.

(iii.) By prescription.

Ownership of things can be acquired in these three ways and in two more:—

(iv.) By manufacture or construction. As a rule, the man who made a thing is its owner, unless he made it out of materials which belonged to some one else, or made it under a contract that it should belong to some one else when made.

(v.) By seizure (or "occupation," as it is technically called). If one man flings a thing away with the intention of abandoning all property in it, any one else may pounce on it and make it his own. Anything so abandoned is said to be "derelict." A ship is sometimes so badly injured in a storm that it is abandoned by its crew. The captain of the next vessel that comes by may take possession of that ship, if he thinks fit, and tow it into port; and its former owners cannot reassert their property in it.

The property in a chattel can only be transferred by the owner or by some one claiming through or under him. If some third person gets possession of such chattel and sells it without the consent of the owner, the buyer will get no better title than that which the seller had. The property in the chattel remains in the original owner, who can recover it from the buyer.

To this general rule there is one important exception. This exception, which owed its origin to the customary law of merchants, was well recognised as part of the common law by the end of the fifteenth century, and is thus declared in section 22 of the Sale of Good Act, 1893[1]: "Where goods are sold in market overt according to the usage of the market, the buyer acquires a title to the goods, provided that he buys them in good faith and without notice of any defect or want of title on the part of the seller."

By "market overt" is meant a public market or fair legally held by grant from the Crown or by prescription, or probably by authority of Parliament. By the custom of London every shop in the City in which goods are publicly exposed for sale is market overt on all days of the week (except Sundays and holidays) from sunrise to sunset. It is, however, only market overt for such things as the owner professes to trade in, and the sale to be a sale in market overt must take place in that part of the shop to which the public are ordinarily admitted.[2]

A sale in market overt by a man who has merely possession of the goods of another will divest that other of his property in the goods and vest it in the purchaser. But if the goods were stolen and the thief is prosecuted to conviction by the true owner, the property thereupon revests in him notwithstanding any intermediate sale in market overt. A different rule prevails where possession of the goods has been obtained from the owner by fraud or other wrongful means not amounting to theft; the property in such goods will not revest in the owner by reason only of the conviction of the offender.[3]

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[1] 56 & 57 Vict. c. 71.

[2] *Hargreave* v. *Spink*, [1892] 1 Q. B. 25.

[3] Sale of Goods Act, 1893, s. 24 (2). See further as to this distinction, *post*, p. 799

A special rule applies where horses are stolen and then sold in market overt to a *bonâ fide* purchaser for value. In the sixteenth century horse-stealing was common, and stolen horses were easily disposed of at markets and fairs. So statutes were passed[1] (and they are still in force[2]) which provide that, for the purchaser to get a good title, the horse must have been exposed in the open market for one hour between 10 A.M. and sunset, and a minute description of the purchaser, the seller, the horse and the terms of the contract must be entered in the book-keeper's book. And even then, if the horse had been stolen, the owner can recover it within six months of the sale by tendering the purchaser the price which he paid for it.

Lastly, it may be mentioned that there are some things which are incapable of private ownership. Wild animals, when alive, and water, which is running along its natural channels over or under the surface of land, are the property of no one. But the owner of the land where they are is entitled to kill the animals, if he wishes, and to use and enjoy the running water; and the animals, when dead, and the water, when confined in pipes, tanks and cisterns, become private property. But a person merely by wounding or killing a wild animal does not reduce it into his possession. If a wild animal has been killed or wounded by one person, and is taken by another before it comes into the actual possession of the person who killed or wounded it, such a taking is not deemed a theft.[3]

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[1] 2 & 3 P. & M. c. 7; 31 Eliz. c. 12.
[2] See 56 & 57 Vict. c. 71, s. 22 (2).
[3] *R.* v. *Roe* (1870), 11 Cox, 554, 557.

CHAPTER IV.

PRIVATE RIGHTS: RIGHTS IN, TO AND OVER THE PROPERTY OF ANOTHER.

WE have described in barest outline the full rights enjoyed by the owner of property. But he is not bound to retain all these rights in his possession. He may split up his dominion, and give or sell some of the fragments to others, while reserving the rest to himself. He still remains the legal owner of the whole, but others have acquired rights over a portion of his property, so that the exclusive enjoyment of that portion is no longer his.

In this way one man becomes the owner of rights in, to or over the property of another. These rights are very various.

Take a common instance of what is known as a "trust." When a marriage is about to take place, the father of the bride often transfers stocks and shares to trustees upon trust to pay the income to the bride for her life, then to the husband for the rest of his life, and then to divide the capital among the children of the marriage. The legal ownership of the property is thus vested in the trustees; the stocks and shares stand in their names, and they receive the dividends. The whole trouble of management falls upon them; but they may not make the least profit for themselves out of the trust. Every penny which they receive must be paid over to the successive beneficiaries.

So when a man dies, his executors stand before the world as the owners of his estate. They are clothed with practically every power which an owner usually possesses. But they may not exercise these powers for their own benefit. They must administer the estate; and unless there is an express provision in the will, they receive no recompense for their trouble. They are the legal owners of the testator's estate, but they may neither use nor enjoy it. They must account to the legatees for all money which passes through their hands.

We turn next to leaseholds. A leasehold is a possessory interest in land. It arises out of a contract, usually reduced into a written lease or agreement, by which the landlord agrees to let certain premises to the tenant for a fixed period (called the term), and the tenant agrees in return to pay him rent and to perform certain covenants in relation to the property. But it is more than a contract; for the tenant has the right at once to enter on the premises, and as soon as he does so he has a real right over the property of his landlord—a right, namely, to remain in exclusive possession of the premises till the end of the term, so long as he pays his rent and keeps the covenants in his lease. And the landlord in his turn has a right, though not a possessory one, over the things of the tenant. If a tenant fails to pay his rent at the proper time, his landlord has a right to distrain practically all the goods of the tenant, and in many cases also the goods of a third person if any such be then upon the premises, and after certain formalities he may proceed to sell them. This right to seize the goods is by law inherent in the relation of landlord and tenant.

There are also important rights over the land of another, which are known as easements. An easement is a right which the owner of one piece of land has over an adjoining piece of land—such as a right to walk over it, to pour water on to it, or to carry a pipe through it for the conveyance of gas or water. But the right is not vested in the owner of the first piece of land personally, but only in him as the owner of that land and so long as he owns it. If he sells that piece of land, the right will pass along with it to the purchaser and may no longer be exercised by the former owner. It is "appurtenant" to the land and "runs with it." The land to which the right is thus attached is called the "dominant tenement;" the land over which the easement is exercised is called the "servient tenement." Should these two tenements subsequently become the property of the same owner, the easement disappears.

An easement may be acquired by grant or prescription. A grant is the express conveyance by a deed under seal of land or rights over land from one man to another. If an owner in fee simple expressly grants a right over his own land to the owner of another piece of land, the latter owner at once acquires an easement. But very often, although the parties obviously intended to create an easement, they omit any express mention of it in the deed. The Court will then sometimes read into the deed a grant of such an easement; this is called an implied grant. Thus, if an owner of land grants to another a part of it so situated that the grantee can only obtain access to it by passing over the part retained by the grantor, the Court will conclude that the grantee was intended so to pass and will imply a grant of "a way of necessity."

Again, an easement may be acquired by prescription. If the occupiers for the time being of the dominant tenement have exercised the right for a number of years openly, peaceably, uninterruptedly, and without any express permission from the owner of the servient tenement, the Court will deem that a user as of right continued for so long a period must have had a lawful origin, and will permit the present occupiers of the dominant tenement to continue to enjoy it.[1] Lord Ellenborough once said that he would, if necessary, presume a hundred lost grants whenever people have for a long period of time been doing something which they would have no right to do, unless they had a deed of grant.[2]

A private right of way is an easement. We have already defined a public right of way.[3] There, no doubt, the soil belongs to one man, though the public have rights of various kinds over a definite strip of it which is called a highway. But a public right of way is not an easement, for there is no dominant tenement, and the public are incapable of taking a grant of a right from any one. Any member of the public is entitled to use a highway, although neither he nor any of his ancestors have ever yet set foot on the spot or owned any land in the neighbourhood. A private right of way is wholly distinct from this right of the public. It exists only in the owner of the dominant tenement; it can be exercised only by the occupier of the dominant tenement and his family, and they will cease to enjoy the right the moment they cease to occupy that tenement.

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[1] This mode of acquiring an easement is largely controlled by the Prescription Act, 1832 (2 & 3 Will. IV. c. 71); see Disturbance of Easements, &c., *post*, pp. 570—572.

[2] And see *L. & N. W. Ry. Co.* v. *Fobbing Level Commissioners* (1896), 66 L. J. Q. B. 127.

[3] See *ante*, pp. 8, 9, and *post*, p. 247.

And there is another distinction between a public and a private right of way. The owner of land adjoining a public highway is entitled to erect gates or open doors so as to give him access to the highway at any point he pleases, whether the soil of the highway be his or not,[1] for he is one of the public. The owner of land adjoining a private way may not do this, unless he happens to be the owner of the dominant tenement.

There is another class of rights over land which is distinct from, though closely analogous to, an easement. A *profit à prendre* is a right which a man may have, not only to enter on the land of another, but also to take something off or out of the land and carry it away for his own benefit. It is this liberty to take a profit out of the land which is the origin of the quaint Norman-French title still applied to this class of rights; it is also the incident which distinguishes a *profit à prendre* from an easement. In the case of an easement those who exercise the right may never take anything out of, or carry anything away from, the servient tenement, except some running water, which is no man's property.[2] But persons who enjoy various rights of *profits à prendre* may, in some cases, catch fish, cut turves or faggots, or dig up gravel, and carry away what they thus obtain; in other cases they may send in horses or cattle to graze, or pigs to pick up acorns, on the adjoining land.

As a rule a right of *profit à prendre* is vested, as an easement always is, in the owner of some dominant tenement. But it is sometimes expressly granted to, or acquired by, a person or corporation who owns no land in the neighbourhood; it is then called a *profit à prendre* in gross. Like an easement, a *profit à prendre* may be acquired either by express grant, or by implied grant, or by prescription.

An easement and a *profit à prendre* must both be distinguished from a personal licence. A licence is merely a permission given by one man to another to do some act which, but for such permission, it would be unlawful for him to do. Thus, if A. gives to B. a verbal permission to walk across his land, this is not the grant of an easement, but a mere licence which renders B.'s action in walking across A.'s land lawful, and not, as it would otherwise have been, a trespass. A licence is a personal right, and cannot be sold or transferred to any one else; if not previously withdrawn, it dies with the man to whom it is given. Moreover, unlike an easement or a *profit à prendre*, it can as a rule be revoked by the licensor, unless the licensee has paid money for it.[1]

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[1] *Marshall* v. *Ulleswater Steam Navigation Co.* (1871), L. R. 7 Q. B. 166; *Ramuz* v. *Southend Local Board* (1892), 67 L. T. 169.

[2] *Race* v. *Ward* (1855), 24 L. J. Q. B. 153.

So far we have dealt mainly with rights over land. But instances occur every day in which one man has rights over things which belong to another. Take, for instance, a bailment.

A bailment arises where the owner of goods voluntarily hands over possession of them to another person, not his servant, upon a trust or under a contract that the other shall do something with or to the goods, and then return them to the owner or deliver them to his order. Two ingredients are essential to a bailment—a delivery, and a trust or contract. The person who so delivers the goods is called the "bailor." The person who accepts such delivery under such trust or contract is called the "bailee." The goods remain the property of the bailor, but the bailee has the possession of them, which carries with it the right to recover them from any wrong-doer who dispossesses him of them during the continuance of the bailment. The rights thus conferred on the bailee carry with them a corresponding duty: viz., he must with due diligence execute the trust or perform the contract, which is the consideration for the delivery of the goods to him. The degree of care which the law exacts from him will vary with many circumstances; if, for instance, he is paid for his services, he must take greater care than would be required of a gratuitous bailee.[2]

The most common instance of a bailment is the delivery of goods to a railway company or other carrier, who expressly or impliedly undertakes to deliver them safely and securely at the destination named, and who is entitled to receive from the bailor payment for the carriage.

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[1] As to when a licence cannot be revoked, see *post*, pp. 578—580.

[2] See Bailments, *post*, pp. 635—640.

If cloth be delivered to a tailor to make a suit of clothes, he takes it upon an implied contract, viz., to make the clothes in a workmanlike manner and to deliver them to his customer when made. He is therefore a bailee.

So is a pawnbroker who receives plate or jewels as a pledge or security for the repayment of money lent thereon—the contract or trust being in this case to keep the thing pledged with ordinary care and diligence, and to restore it upon repayment of the money advanced upon it.

So, if a man takes in cattle to graze on his land, he is a bailee. This particular kind of bailment is technically termed an agistment, and the bailee takes the cattle in this case on an implied contract that he will look after them with ordinary diligence—which means with that degree of diligence which men in general would use in their own concerns. For example, the agister of a horse, although he does not insure its safety, is bound to take reasonable care of it and, if it be killed through his negligence, is liable for its value.[1]

There is another right over goods called a lien; it often arises out of a bailment. A lien is a right to retain possession of goods and to refuse to deliver them up to the owner till a debt due from him be paid. It is a right merely to retain possession, not to use the goods. If the person who had the lien gives up the goods, he has no right to retake possession of them; should they afterwards lawfully come again into his possession, his right of lien will revive.

A lien may arise in many different ways. First, there is a vendor's lien. If one man sells goods to, or manufactures articles for, another, he is entitled to retain those goods or articles, if he wishes, until the price be paid, unless he has expressly or impliedly agreed to deliver them to the purchaser before payment; and this, although the property in them may have passed to the purchaser when the contract was made. But if the price of these goods be tendered to him, he cannot retain them on the ground that other goods, which he sold and delivered to the same purchaser on a previous occasion, have not been paid for. Then there is the artificer's lien. Any man who mends a coat or repairs a carriage is entitled to keep that coat or carriage from its owner until he is paid for his labour. So a miller has a lien on flour which he has ground for the cost of grinding it. Again, a common carrier and an innkeeper are bound by the common law to receive goods which are brought to their premises in the ordinary way of their business. Hence they have a lien on the goods so entrusted to their care. An innkeeper cannot detain the person of his guest if he refuses to pay his bill; he cannot take his coat off his back to secure payment, but he may detain his luggage.[1] These are all cases of what is called a particular lien—*i.e.*, a lien which entitles a man to retain goods until he is paid the debt which has arisen in connection with those particular goods, and that debt only. In some cases, however, a general lien arises—*i.e.*, a lien which entitles a man to retain any goods which he has received from A. until A. has paid him all the debts he owes him, whether such debts arose out of matters connected with those goods or not. This larger lien arises by virtue of a contract, expressed or implied, from a course of dealing between the parties or under a custom of some profession or trade. Solicitors, bankers, wharfingers, factors, dyers and many other traders are allowed such a lien.

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[1] *Smith* v. *Cook* (1875), 1 Q. B. D. 79; and see *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

Thus, if a jeweller repairs A.'s watch, he can retain possession of the watch until A. pays him what is owing for the repair of that watch; but if this be paid, he cannot retain the watch because A. owes him money for work previously done to other jewellery. On the other hand, if a solicitor conducts three separate actions for a client, he can retain the papers connected with all three actions until the client pays him his three bills of costs in full.

A lien comes to an end when the person exercising it gives up possession of the goods to the owner, or when he takes other security for his debt under circumstances which show that he intended to abandon his lien on the goods over which he originally exercised it.[2] There is an exception to this in the case of a shipowner, who has a lien for freight on all goods that he has carried. This lien continues, if necessary, after the goods have passed out of his possession, if they are landed under a wharf certificate which allows the lien so to continue.

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[1] See 41 & 42 Vict. c. 38, s. 1.
[2] *In re Taylor*, [1891] 1 Ch. 590.

When one man is asked to lend money to another, he naturally asks what security the borrower can offer for the repayment of the loan ; he is not, as a rule, content to advance the money merely on the personal promise of the borrower that he will repay it. The security offered may be either land or things, and may be given in many different ways. We will deal here with the three most usual kinds of security :—

(i.) Mortgage of land.
(ii.) Pledges of things.
(iii.) Hypothecation of land or things.

(i.) When money is advanced upon the security of land, a deed of mortgage is usually drawn up between the borrower and the lender, under which the borrower (called the "mortgagor") transfers the legal title of the land to the lender of the money (called the "mortgagee"). Although the mortgagee has the right to immediately enter into possession of the mortgaged land, he does not do so, but the mortgagor is allowed to remain in possession of the land until he makes default in payment of the interest or debt. Such a transfer of title is regarded merely as a security for the repayment of the loan of money, and therefore the mortgagor can redeem the land, even though the day fixed in the deed for redemption has passed. If he wishes to do this, he must give the mortgagee six months' notice of his intention to repay the loan with interest and costs, and on repayment he is entitled to a reconveyance of the land. If the mortgagee refuses to reconvey, the mortgagor can compel him to do so in an action of redemption. But the mortgagee is always entitled to call upon the mortgagor to redeem within a certain time, and on his failing to do so can bring an action which may end in the mortgagor being altogether deprived of his right of redemption. This is called "foreclosure." The mortgagee can also enforce his security by selling the mortgaged land ; but before he can do this, he must give notice to the mortgagor of his intention to do so, if the debt and interest be not paid within a specified time. He can also sue the mortgagor on the personal covenant to repay the loan with interest, which is always contained in the mortgage deed.

So long as the mortgagor is allowed to remain in possession of the land mortgaged, and the mortgagee has given no notice of his intention to take possession or to enter into the receipt of the rents and profits, the mortgagor has power under various statutes,[1] and subject to certain conditions, to grant leases of the land, to sue for the rents and profits due under such leases, to sue any trespasser for damage done to the land, without joining the mortgagee as co-lessor or co-plaintiff.

(ii.) When money is advanced upon the security of things, the owner usually hands over the possession of his goods to the creditor to hold until the debt be paid. This is called a pledge of those things, and the contract between the parties falls under the head of bailment, which we have noticed above. The borrower is the bailor of the goods, the lender of the money is the bailee, and the trust imposed on the bailee is to take reasonable care of such goods and to return them on repayment of the sum lent with interest, if any was to be paid.

(iii.) But in other cases the lender does not at once take possession of the land or thing which is offered to him as security for the money advanced; he is content if power be given him to enter on the land or seize the thing in case default be made in repayment. This is called an hypothecation. It is the distinguishing feature of an hypothecation that the borrower retains possession of the property which he offers to his creditor as a security for the loan. It therefore differs from a pledge and all other kinds of bailment, because in these the bailor gives the bailee possession of the goods bailed. For the same reason it differs from a lien; for a man cannot have a lien on a thing, unless he is in possession of it: if he parts with the possession, he loses his lien. In some cases an hypothecation may be implied. The landlord's right to distrain goods on the demised premises is an instance of an implied hypothecation.

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[1] Notably under the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5); and the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18.

Thus, where the security is land, it often happens that neither the title to nor the possession of the land is transferred to the lender; yet a valid charge on the land is created in his favour as a security for the debt. For example, if the title deeds of land be deposited with a bank as security for a loan, both the ownership and possession of the land remain in the borrower. A memorandum is usually drawn up setting out the terms of the deposit, but this is not absolutely necessary. A charge may even arise if, without actual deposit, the borrower gives the lender a memorandum containing a promise to deposit the title deeds on demand. In either case, if the borrower fails to repay the loan with interest, the Court will order him to convey to the lender his interest in the land so charged.

Again, where the security consists of goods, the borrower often wishes to remain in possession of his goods and have the use and enjoyment of them during the continuance of the loan. The most frequent instance of such a security is a "bill of sale." A bill of sale by way of security[1] is a document under which the borrower promises to repay the amount of the loan, usually by instalments at certain fixed dates, and empowers the lender, in case default be made in payment of any instalment, to seize and carry away all the furniture and other goods specified therein. Bills of sale were so frequently made instruments of extortion and oppression that they are now required to be made in accordance with a prescribed form,[2] to be signed by the borrower in the presence of a credible witness, and the loan for which the bill is given must not be less than 30*l.* The bill of sale must then be registered within seven days, and an affidavit must be filed at the same time, verifying the date, the due execution and attestation of the bill, and the residence and occupation of the borrower and of every attesting witness. Unless all these formalities are complied with, the authority to seize the goods is void.

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[1] There are also absolute bills of sale, which are not mortgages, but transfers of goods.

[2] This form is set out in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43).

CHAPTER V.

PRIVATE RIGHTS: RIGHTS AGAINST PERSONS.

RIGHTS against persons are created by their own voluntary acts or omissions. The fact that one man possesses a right imposes on another a duty not to violate that right. "A violation of a legal right committed knowingly is a cause of action."[1] If A. has entered into a contract with B., it is his duty to perform his part of it; if he does not do so, B. has a good cause of action against him for such breach of contract. Again, if A. violates any right possessed by B., or neglects his duty to B. in a way which causes B. damage, A. has committed an actionable wrong which lawyers call a tort, and for which B. can recover damages by way of compensation. These are civil obligations and are enforced by civil actions; neither a tort nor a breach of contract is, as a rule, a crime, though in some cases they may also give rise to criminal liability.[2]

RIGHTS ARISING OUT OF CONTRACTS.

A contract is a bargain which the State will enforce.

The two essential elements of a bargain are—

(i.) that both parties should mean, and agree to, the same thing;

(ii.) that each should, by word or conduct, inform the other that he or she does so agree.

But the State is not, as a rule, content with these two essentials. It generally requires some additional element or formality before it will recognise the bargain as a binding contract. In some cases the State requires that the terms of the bargain should be stated in writing, or that the document should be stamped or registered somewhere, or that there should be some consideration for the promise.

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[1] *Per* Lord Macnaghten in *Quinn* v. *Leathem*, [1901] A. C. at p. 510.

[2] See *post*, pp. 105—107.

The State requires these additional formalities for two reasons—

(i.) to distinguish the concluded bargain from preliminary haggling;

(ii.) to preserve a clear record of the transaction.

If these formalities be absent, the State will not enforce the bargain, which is then no contract.

A contract, then, is an agreement enforceable at law between two parties, by which rights are acquired by one to acts or forbearances on the part of the other. It is founded on the consent of the parties; but it owes its obligatory force to the law. In every civilised country the law deems it for the wellbeing of the community that every man should fairly and honestly perform what he has undertaken to do. It therefore attaches binding force to any bargain made by competent persons which is not contrary to public policy, or impeachable on any moral ground. If it cannot compel the performance of such a contract, it will enforce compensation for its non-performance.

The benefit of a contract can, as a rule, be assigned to a stranger without the consent of the party burdened by it. The burden of a contract cannot be assigned without the consent of the party entitled to the benefit of it, unless some benefit be assigned along with the burden. No one can sue on a contract, unless he is either an original party to it or the lawful assignee of an original party: though in a few cases a stranger to the contract may bring an action of tort if the contract was entered into with reference to him and he has been injured by its negligent performance.

A contract may be put an end to by performance, or by a new contract, or by simple rescission, or release. The right to sue on a contract may be barred by lapse of time, or by the bankruptcy of the person liable.

RIGHTS ARISING OUT OF TORTS.

The State will compel a man who does a wrongful act to compensate all who are injured by it. Where there is no contract between the parties, such a wrongful act is called in law a tort, and the action by which the person wronged obtains compensation from the wrong-doer is called an action of tort. Such an action will lie—

(i.) if the defendant has violated the plaintiff's right; or

(ii.) if the defendant has neglected a duty which he owed to the plaintiff and so caused him damage.

It is an injury to A. if B. violates his rights, although such violation has not involved A. in any pecuniary loss; hence any injury to A.'s property or person, or in most cases to his reputation, is actionable without proof of any pecuniary loss. But if B. neglects a duty which he owes to A., and such neglect in no way affects A.'s rights, it will only give A. a right of action if it causes him harm or loss. If B. neglects his duty, but no harm or loss ensues to any one, no one can sue.

The right of the person injured to compensation does not, as a rule, depend on the motive or intention of the wrong-doer. The plaintiff need not prove that the defendant intended to injure him; he may have intended to injure somebody else, or to have injured nobody; but if he has in fact injured the plaintiff by a wrongful act, he must as a rule compensate him. No action will lie for harm or loss occasioned by a lawful act, even if it be done maliciously.

No act which the law authorises is a tort. But every other act or omission is a tort if it infringes the right of another, or is a breach of a duty owed to that other which has caused that other damage, or is a breach of a duty owed to the public which has caused someone damage over and above that suffered by the rest of the public.

An unsuccessful attempt to commit a tort is not a tort. A breach of contract, as a rule, is no tort. But for one man without lawful excuse to incite another to break his contract with a third person is a tort.

CHOSES IN ACTION.

The distinction between a right of ownership and a right against a person merely is very important. If A. lends B. 5*l.* without security, he has no special rights over any portion of B.'s property; he has no interest in, or charge or lien on, or any right to seize, any land or any thing of B.'s. He has no claim on any particular five sovereigns. B. merely owes him 5*l.*; and the value of that debt may be doubtful: it depends on B.'s solvency. In other words, A. has no *jus in rem*, no *jus in re alienâ*; he has only a *jus in personam.* Again, if A. knocks B. down in the street, or flings a stone and breaks B.'s window, A. incurs liability to B. B. has a right to sue A. for damages. But till judgment and execution B. acquires no rights over A.'s property.

Nevertheless such a right of action, whether founded on contract or in tort, is an asset of some value; and since the Judicature Act, 1873, it can be sold and assigned to a third person.[1] It must therefore be regarded as a kind of property; and when so regarded it is called a "chose in action:" this is a Norman-French phrase which our ancestors employed to indicate a right to take proceedings in a court of law to recover a debt or damages. It was thus opposed to things in possession, which were tangible property, capable of being stolen or taken in execution under a judgment of the Court. A right of action to recover unliquidated damages was as much a chose in action as a debt for a fixed amount. But in either case the right had to be vested; the mere possibility that A. might hereafter do or omit to do something which would give B. a cause of action against him was not a chose in action.

The phrase "right of action" is used when the parties are contemplating immediate litigation; but when the right is regarded as a species of property, it is called a "chose in action." And there is this further distinction between the two terms. A. may owe B. money, but the time for repayment may not yet have arrived. This is a good debt, although it is one which is not yet payable. It is therefore a chose in action, although B. has not at present any right to sue for it.[2]

Originally, then, the term "chose in action" was applied only to a debt, to a claim for damages, to any right to take proceedings either at law or in equity to obtain some other judicial relief, and to any document (such as a bond, bill, promissory note or agreement[1]) which was mere evidence of such a right. It did not include any other incorporeal right of property;[2] and of course it included no tangible personal property. In more modern times, however, there sprang up several species of incorporeal personal property, which were unknown to our ancestors, such as Consols, stocks, shares, debentures, patents and copyrights. All these—probably for want of a better classification—were also called choses in action. A mortgagor's right of redemption, however, is not a chose in action but an equitable estate in the land mortgaged.

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[1] See Assignment of Contracts, *post*, pp. 773—775.

[2] See *Brice* v. *Bannister* (1878), 3 Q. B. D. 569; *West* v. *Newing* (1900), 82 L. T. 260.

We have so far described property as consisting of land or things, or rights in, to or over land or things, or rights against persons. And we have divided property into two classes, tangible and intangible; tangible property consisting of land and things: intangible, of the various rights just mentioned. Tangible property can obviously be sub-divided into two classes—moveable and immoveable property; things are moveable, while land is not. "No man, be he ever so feloniously disposed, can run away with an acre of land."[3] But our ancestors, whether laymen or lawyers, were eminently practical men, not scientific theorists; they looked at all these questions from the point of view, not of the nature of the property itself, but of the nature of the remedy which the owner would have if he were dispossessed of it. If a man were ousted from his land, he could claim to recover the fields themselves; he could bring what was called a real action, an action *in rem*. But if he were dispossessed of some thing, he could only claim damages from the trespasser or thief; he could only bring a personal action, an action *in personam*. He could not in early times compel restitution of the thing itself; the common law at first knew of no such action.

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[1] *R.* v. *Watts* (1854), Dearsl. 326.

[2] "There was formerly no such thing as an incorporeal chattel personal:" *per* Cotton, L. J., in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. at p. 275.

[3] Williams on Real Property, 12th ed., 1.

Hence the moulders of our common law divided property into two classes. Real property was that in respect of which a real action would lie, *i.e.*, land and rights in or over land. Personal property was that in respect of which a personal action would lie, *i.e.*, things (or, as they preferred to call them, chattels) and choses in action. There was, however, one class of property which appeared to our ancestors to contain elements both real and personal, and to which they therefore gave the self-contradictory title of "chattels real." These consisted of leaseholds and other chattel interests in land; and the owner was permitted to enforce his right to property of this kind by a "mixed action."

This classification of property still lingers in our law, though its divisions are unscientific and its nomenclature meaningless, if not misleading. An English lawyer is, therefore, still compelled to tabulate the different kinds of property in the following illogical manner -illogical, because it is based upon distinctions of procedure which are now obsolete:—

I. Real property consists of—
    (i.) land;
    (ii.) rights in, to or over land.
II. Personal property consists of—
    (iii.) chattels real;
    (iv.) chattels personal;
    (v.) choses in action.

CHAPTER VI.

PUBLIC WRONGS.

So far we have dealt with rights of property and rights of action (*jura in rem, jura in re alienâ, jura in personam*). These rights are all created and protected by the State, defined and regulated by its laws.

The State will not regard as a tort every act which has caused damage—not even if the act be done maliciously with the intention of causing damage. The act must be in itself "unlawful;" and the law decides what acts are lawful, and what are not. Moreover no action lies to recover compensation for any harm or loss which is not the direct consequence of some wrongful act or omission of the defendant's.

So with contracts. The State will not enforce every bargain which the parties may think fit to make between themselves. In some cases the State requires that the contract shall be reduced into writing and signed; in all cases it requires either that it shall be reduced into writing and signed, sealed and delivered by the parties, or that the person on whom the burden of the contract will rest shall receive some valuable consideration. The State will not enforce an illegal or immoral contract, or any contract which it deems contrary to public policy (such as a betting or wagering contract, or a contract by an occupier of land that he will not avail himself of the provisions of the Ground Game Act, 1880[1]). The State will not as a rule enforce a contract made by an infant, though it will now enforce a contract made by a married woman. The State will not enforce a contract obtained by fraud, violence or undue influence, or an unfair bargain made with an expectant heir, or many contracts made with a professional money-lender.[2]

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[1] 43 & 44 Vict. c. 47, ss. 2, 3.

[2] See the Money-lenders Acts, *post*, pp. 718, 731.

The State then creates, defines and regulates all civil rights. Nevertheless every civil right, as soon as it is created, vests in the individual person concerned. It becomes his property, and he may use it or not as he pleases. The State cannot compel him to bring an action if he is unwilling so to do, nor compel him to abandon his action if he wishes to continue it.

We now pass to a class of cases which is governed by different considerations—to those violations of public right and those neglects of public duty which we call Crimes. In such matters the State assumes a sterner attitude, and speaks in more imperative tones. Such acts and omissions are forbidden under pain of fine or imprisonment. The laws which forbid such acts and omissions are "commands" in the strictest Austinian sense; they are enforced by stringent sanctions, and the State in issuing them is clearly an "uncommanded commander." The matter is no longer in the hands of a private person; it is the duty of the officers of the State to repress that which the State has declared to be hurtful to the community as a whole.

A crime is a wrongful act or omission which the State punishes in the interests of the community at large. Every offence of a public nature, every violation of a right of the public, every neglect or omission of a duty owed to the public, is a crime. So is any act which is "of a public evil example,"[1] such as the performance of an immoral play, the sale of obscene books or pictures, or any other act of public indecency. An unsuccessful attempt to commit a crime is a crime, if the offender has done all in his power, or nearly all in his power, to carry his criminal intention into effect. An omission to do one's duty will be a crime if it is likely to involve serious consequences to others, such as loss of life or limb, or permanent injury to health. Gross negligence, even in doing a lawful act, may sometimes also be a crime.

But by no means every crime is a tort. It is not essential to constitute a crime that any member of the public should actually sustain injury or inconvenience. No private individual, for instance, has any right of action for damages because another has unsuccessfully attempted to obtain money from him by false pretences, or has forged his name to a cheque so clumsily that no one is deceived by it. These and many other wrongful acts, then, are crimes but not torts.

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[1] 2 Hawk. P. C., c. 25, s. 4.

Again, it is not necessary that every act which the State thus prohibits should be in itself morally wrong. It often may be necessary, in the interest of the community at large, that some act innocent in itself should be forbidden, and that those who disregard the prohibition should be punished. An act or omission, which in ordinary circumstances can do no harm, may become harmful if done at a particular time, or in a particular place, or in other special circumstances.

Thus the manufacture of gunpowder is in itself an innocent and indeed a useful act, and when manufactured it must be stored somewhere. But it is a danger to the public, and therefore indictable as a nuisance, for any one to manufacture or to keep in large quantities gunpowder or any other explosive or inflammable material in a town or closely inhabited place.[1] Again it was always regarded as a crime by the common law of England for any one knowingly to send to market for sale as human food meat which was unfit for human consumption.[2] But ignorance is easy to plead and difficult to disprove, and ignorance in such a matter is gravely culpable whenever it endangers human life and health. Hence by a modern statute it has been made a misdemeanour for any one, even unknowingly, to send such meat to market to be sold as human food.[3]

But it may be asked, As not every wrongful act is a crime, and not every criminal act is in itself wrongful, on what principle does the State determine what acts it will forbid and punish? What test does the State apply to determine whether it will place a particular act or omission in the category of crimes, or only in the less obnoxious list of torts? The answer is that the only test which can be applied is that which is or should be the touchstone of every law, namely, the greatest happiness of the greatest number. The State must repress that which the needs of the nation at any given moment require to be repressed. Our ancestors were content with a simple code of criminal law, which would be wholly inadequate to meet the necessities of a more complicated civilisation. As commerce spreads and the luxuries of life increase, the opportunities for fraud and violence multiply, and new kinds of crime are constantly invented, against which the people must be protected by fresh legislation.[1] Hence it is very difficult to reduce crimes to any scientific classification, or even to draw a strict line of demarcation between a crime and a tort.

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[1] *R.* v. *Lister* (1857), Dearsl. & B. 209.
[2] *Shillito* v. *Thompson* (1875), 1 Q. B. D. 12, 14.
[3] See 35 & 36 Vict. c. 74, s. 2.

A crime then is the breach of a duty imposed by law on every citizen for the benefit of the community at large; a tort is the breach of a particular duty owed to an individual. The distinction, nevertheless, is of a somewhat accidental character. It is not based on any clear logical principle, but rather finds its explanation in history. At different periods, different acts have been regarded either as tortious or as criminal, according to the prevailing sentiment of the day. Many acts are now criminal in England which were formerly matters of purely civil jurisdiction. In Roman law theft was a crime as well as a tort; but we consider it solely a crime. The Romans regarded adultery as a crime; in English law it is a civil injury, giving a right to damages against the adulterer.

Some writers on jurisprudence tell us that a crime is an injury which directly affects the State, while a tort directly affects the individual. But most crimes directly concern an individual; take, for instance, larceny and murder. Other writers say that the substantial distinction lies rather in the remedy pursued: when the wrongful act is a crime, the State prosecutes and punishes the offender: when it is a tort, the remedy is left in the hands of the individual aggrieved, who may sue for damages or not, as he pleases. But this distinction also is far from satisfactory. We often hear of "private prosecutions;" and indeed it is seldom that the State initiates any criminal proceeding of its own accord: it generally waits for some individual to set it in motion. The distinction surely cannot depend upon differences of procedure which are accidental rather than essential.

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[1] "Quaeritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus."
Per cur. in *Twyne's Case* (1601), 3 Rep. at p. 82 a; 1 Sm. L. C., 12th ed., at p. 4.

A third test has frequently been applied in modern times —a somewhat topsy-turvy test; for it makes the nature of the act depend upon the ultimate result of the proceedings which may or may not be subsequently taken against the wrong-doer. If the proceedings end in the infliction of fine or imprisonment upon him, then he has committed a crime; if, however, they end in a judgment against him, awarding the plaintiff a certain sum of money as damages, then his act was a tort and not a crime. This is a practical distinction, no doubt, and one which has been frequently applied in our Law Courts.[1] But is not this putting the cart before the horse? It seems somewhat illogical to make the quality of the wrongful act depend upon its consequences, not to the person injured, but to the wrong-doer. This test, in short, does not go to the root of the matter, or disclose any fundamental basis for the distinction.

We venture, therefore, to submit the following definitions as a clearer statement of the essential difference between a crime and a tort:—

A crime is a wrongful act of such a kind that the State deems it necessary, in the interests of the public, to repress it; for its repetition would be harmful to the community as a whole.

A tort is a wrongful act which gives the person injured a right to be compensated by the wrong-doer for the injury done him.

But it must be confessed that this distinction between a tort and a crime was unknown to our Saxon and Norman ancestors—or at all events was wholly ignored by them. It has been stated that all nations in the earlier stages of their civilisation recognise only torts, for they have not yet risen to the conception of a crime. It would be more correct, however, to say that early civilisations possessed a body of law which dealt with a group of miscellaneous offences, some of which resemble our modern crime, while others are more analogous to the modern tort.

Still, even in Anglo-Saxon society there was the "wer" as well as the

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[1] See, for instance, the judgments in *Cattell* v. *Ireson* (1858), E. B. & E. 91, and in *Seaman* v. *Burley*, [1896] 2 Q. B. 344.

"wite" in respect of most penal offences; and in Cnut's time there was a clear list of the King's "rights" (hám-sócne [burglary], flymenafyrmðe [harbouring of runaways], mund-bryce [breach of the peace], &c.). The Norman Kings and still more the Plantagenets built up a strong central criminal jurisdiction, which was enforced either in the King's own Court or in the county courts by the King's visiting justices. Nevertheless, appeal of felony was not for centuries abolished[1] and was at first no doubt encouraged, at least negatively, the King being concerned rather with the fines to which he was entitled than with the crimes themselves. It was not till the reign of Henry VIII. that there came into vogue the system of prosecution by indictment, which was a nearer approach to our modern criminal procedure. The history of our law thus ever disappoints those who expect to find in it any scientific theory or nice analysis of modern jurisprudential conceptions.

It follows from the above definitions that the same wrongful act may be both a tort and a crime; for an act which injures an individual and entitles him to compensation may at the same time be such that its repetition would be most harmful to society. So in a few cases a breach of contract may be a crime.[2] But these coincidences in no way affect the position, or alter the action, taken by the State with reference to an act which it has forbidden under pain of punishment. In such cases the wrong-doer is liable to proceedings of two kinds—the individual whom he has injured may bring a civil action against him for damages: the State may prosecute him for the crime which he has committed. Nevertheless the object of the criminal proceedings will be in every case to punish the offender and to prevent any repetition of the offence; the object of the civil proceedings will be to compensate the person injured by giving him damages or other relief. The person injured conducts the civil action, irrespective of the Crown; the Crown conducts the prosecution independently of the plaintiff. Only the plaintiff can settle the action; only the Crown can pardon the crime.

When the same wrongful act is both a tort and a crime, no one can bring an action for damages for the tort unless he has suffered some special injury over and above what every one else has sustained. The mere fact that A. has committed a crime is no reason why all the citizens of London should claim damages from him ; each plaintiff must show a separate loss peculiar to himself. Thus, a conspiracy by two or more persons to do an unlawful act is in itself a crime. In order to sustain an action for such a conspiracy the plaintiff must not only prove the conspiracy ; he must also show that some wrongful act was done in pursuance of it by the defendants which has caused some special or particular damage to himself.[1]

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[1] It was not absolutely abolished till 1819, though it had then long been obsolete: see *Ashford* v. *Thornton* (1818), 1 B. & Ald. 405.

[2] See *post*, p. 106.

It is always, however, a defence to a charge of crime that the mind of the accused did not go with his act. He must know what he is doing, and he must know that what he is doing is wrong. He must possess both will and judgment and be free to exercise both. Hence no man can commit a crime when he is asleep or has been thoroughly drugged ; but drunkenness voluntarily produced is no defence in ordinary cases. No infant under seven years of age can commit a crime. Coercion and extreme necessity are defences in all save the gravest cases. A lunatic will be punished if he knows both what he is doing and that he ought not to do it, although his desire to do it may be prompted by some delusion. But he will not be liable where the delusion is of such a kind that, if the facts were as he supposed, his act would be justifiable. So, if a criminal act be committed under a reasonable mistake as to a matter of fact, the prisoner's guilt depends on whether he would still be liable if the facts were as he supposed. A mistake as to the law excuses no one.

In ordinary cases the burden of proving such facts as somnambulism, lunacy, duress and mistake lies on the prisoner. For the law presumes that every one of full age knows what he is doing, knows right from wrong, and knows (and therefore intends) the natural consequences of his act.

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[1] See *post*, pp. 625 *et seq.*

CHAPTER VII.

REMEDIES.

LAW not only creates rights; it also provides remedies for wrongs. A law, as we have seen, is a rule of conduct which the State prescribes and enforces. It is prescribed by substantive law, and enforced by adjective law. In other words, substantive law deals with rights and duties, adjective law with remedies. The wisest measure conferring rights or imposing duties will be inoperative, if no adequate remedy be provided in case those rights are violated or those duties neglected. A defect in the machinery by which an Act is to be enforced will often render that Act a dead letter.

It is the boast of English law that "there is no wrong without a remedy." But this boast is not wholly justified. There are certain wrongs for which the law, on grounds of public policy, allows no redress. Thus no action will lie for certain acts of State, or for defamatory words uttered in Parliament or by a judge on the bench. Again the remedy for a wrong may in some cases be barred, although the right is not extinguished. In such cases the remedy may sometimes be revived.

As a rule, the remedy must be sought in the Law Courts. But there are a few cases in which a person injured may "take the law into his own hands" and obtain redress without legal proceedings. Thus he may enter upon his own lands, or retake possession of his own goods, whenever he can do so peaceably; he may enter upon the lands of another to abate a private nuisance, or to distrain for rent in arrear. But in most cases he must have recourse to litigation.

There are two kinds of remedies—criminal and civil. When the State proceeds to enforce the rights of its citizens by punishing those who violate them with fine and imprisonment, the proceedings are criminal. When the State compels wrong-doers to compensate those whom they have injured, and to abstain from any repetition of the wrongful act—when it insists on the due performance of contracts and the payment of damages in case a contract is broken—the proceedings are civil.

Criminal proceedings are heard in the following courts:—

Magistrates' Courts.
Borough Quarter Sessions.
County Quarter Sessions.
Assizes.
The Central Criminal Court.
The King's Bench Division of the High Court of Justice.
The Court of Criminal Appeal.
The House of Lords.

In criminal courts the proceedings usually commence with a summons, bidding the accused appear in court before the magistrates on a certain day: in some cases a warrant will be issued at once for his arrest. Simple matters are disposed of summarily by the magistrates. Graver cases are sent to Quarter Sessions or to the Assizes for trial by a jury. In these graver cases, the prosecution states in detail the precise charge against the prisoner in a document which is called an indictment. The trial commences by the accused person being called upon to enter the dock and plead to the indictment preferred against him. But no one now can be called upon to do this, unless—

(a) he has been committed by justices of the peace to take his trial there on that charge, or

(b) the consent or direction in writing of a judge of the High Court or of the Attorney-General or Solicitor-General to the presentation of the indictment has been given.[1]

In some few cases the prisoner must state his defence in a written plea; but, as a rule, he merely pleads "Guilty" or "Not guilty" orally from the dock. If he pleads guilty, or if after pleading not guilty he is tried and convicted, he may be sentenced to fine, imprisonment or death, according to the nature of the crime which he has committed.

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[1] Grand Juries (Suspension) Act, 1917 (7 Geo. V., c. 4).

Civil proceedings are heard in the following courts :—

The County Courts.
The Borough Courts (*e.g.*, the Mayor's Court, London).
The High Court of Justice.
The Court of Appeal.
The House of Lords.

Before taking civil proceedings a man should satisfy himself that he has a good cause of action. He should next inquire who are the proper parties to be joined as plaintiffs or defendants respectively. He should also inquire which is the right court in which to sue in order to obtain the relief which he desires.

Different kinds of relief granted by our Courts.[1] Among those which most frequently occur are :—

(i.) An order for payment of a debt, with or without interest.

(ii.) Damages by way of compensation.

(iii.) An injunction to restrain any repetition of the offence.

(iv.) A declaration as to the right or title of the plaintiff.

(v.) Possession of land.

(vi.) Delivery of a chattel.

(vii.) An account.

(viii.) A receiver.

(ix.) Specific performance of a contract.

(x.) A *mandamus* to compel the defendant to perform his statutory or other public legal duty.

In civil courts the proceedings commence with a writ, summons or plaint, which is served on the defendant, so that he may know he is being sued. This document also tells him in general terms the nature of the claim which is made against him. But it is usually followed by particulars or some other pleading which gives him the details of the plaintiff's cause of action. In some cases the defendant must then state what his defence is; in other cases he need not disclose this till the trial. In actions of much intricacy there are also other interlocutory proceedings before the trial, such as disclosure of documents and answers to interrogatories. Civil actions are tried by a judge either with or without a jury. In many cases either party, if he applies in time, can obtain a jury—special or common. At the trial one party or the other obtains a judgment, which he may enforce by execution against the property of his opponent.

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[1] See *post*, p. 1151 *et seq.*

The judge at any trial, civil or criminal, directs the jury as to all points of law, but leaves them to decide all questions of fact. In his summing up he advises them as to the bearing and value of the evidence brought forward by either side. It is the duty of the judge to declare the common law and construe the written law; he must state to the jury in general terms the law applicable to the case before them; he may accompany this statement by any observations or explanations which he deems material. But on the trial of an indictment, only the jury can find the prisoner guilty. It is they who have to say, on the facts proved before them and on the law laid down by the learned judge, whether the prisoner is "Guilty" or "Not guilty." So in a civil action, if there be conflicting evidence, on which the jury might reasonably find a verdict for either the plaintiff or defendant, the judge must leave the issue to them; he cannot decide it himself. He may, if he thinks fit, state to them his opinion on the matter. But the jury are not bound to adopt his view as to any question of fact. They are bound to accept the law as laid down by him; but it is for them to determine the issues of fact according to their own opinion of the evidence given before them, even though it may be contrary to the opinion which the judge has just expressed.

These and many other matters connected with procedure both criminal and civil will be found discussed in Book V. under the head of Adjective Law. It is as true now as it was in the time of Sir Edward Coke that "every subject of this realme, for injury done to him in *bonis, terris, vel persona*, by any other subject, be he ecclesiasticall or temporall, free or bond, man or woman, old or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay."[1]

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[1] Coke's Institutes, Part II., c. 29, p. 55.

CHAPTER VIII.

THE SOURCES OF THE LAW OF ENGLAND.

THE amount of English law is something appalling. It is a megatherion of colossal bulk. More than fifty different systems of law are administered in the British Empire, very few of which have any pretence to a code. It would be interesting to trace the history of each of these systems and to contrast its provisions with those of the others. In this work, however, we must confine our attention to the law which is in force in England and Wales.

From what sources is this law derived?

The law of England is largely derived from antecedent custom. We have already defined customary law as that portion of the law of any State which happens to have been custom before it was made law. Whether these ancient customs could properly be styled "laws" before they were accepted as law in our Law Courts is a moot point on which theorists differ. But to us in the present day no custom (or at all events no general custom[1]) has the force of law, unless we can find some record of it in some statute or ordinance, or in the decisions of our tribunals, or in some standard text-book of long-established authority.

When the Angles, Jutes and Saxons landed on our shores, there was no doubt in England a mass of British customs, still with a veneer of Roman law. These disappeared before the advance of the heathen invaders; the Britons were gradually driven into Wales and Damnonia and carried their law and customs with them. The place of these was taken by a variety of Teutonic usages, which were supplemented by others of a somewhat different character at a later date when the Danes settled in our eastern counties. A large portion of these diverse customs—probably the larger portion —was embodied in the Dooms of Aethelbert, King of Kent (*circa* A.D. 600), in the Dooms of Ine, King of Wessex (*circa* A.D. 690), in the Ordinances of King Alfred the Great (*circa* A.D. 900), and in the English Dooms of Cnut, who died in A.D. 1035. They thus became laws; for the King at this time was the only lawmaker in England.[1] No Celtic element can be found in these primitive Anglo-Saxon and Danish Codes; nor any trace of Roman law, except in the few portions which deal with ecclesiastical affairs.

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[1] As to local customs, see *post*, pp. 76—86.

After the Norman Conquest the Saxon system of land tenure was crushed beneath an alien feudalism; the methods of trial and the punishments were altered in the case of the more serious crimes; but in most other respects our Norman Kings permitted their Saxon subjects to retain their Saxon laws and customs. In the reign of Henry I., and even in that of his grandson Henry II., there still flourished in England four different kinds of law. The Wessex law, the Mercian law, and the Dane law still survived in their own shires and shaded off into each other; but, apart from and above these local systems, stood paramount the law and practice of the King's own Court, the *Aula vel Curia Regis.* Glanville,[2] the first of the long series of our great text-book writers, wrote in the last year of King Henry II. a tractate concerning the "Laws and Customs of the Kingdom of England," in which he tells us nothing of the law administered in the local Courts, but confines himself to the justice administered in the King's Court and by the King's justices when on circuit. And before the reign of Edward I., though local customs still lingered here and there, the four systems were welded into one "Common Law," which was in force all over England.

Already, too, English law had shown a tendency to become case law. We still have transcripts from the parchment rolls on which the decisions of the King's Court were faithfully recorded by its officers.[1] These date back as far as 1194. Before the year 1268 Bracton[2] wrote his famous treatise "*De Legibus et Consuetudinibus Angliae.*" In the twelfth century (*circa* 1149) Vacarius had lectured at Oxford on the Institutes of Justinian, and Bracton, like other legal writers under the Plantagenets, incorporated into his treatise large portions of the Roman law and declared that these were also the law of England. But the book is founded mainly on the decisions of the King's Court, of which Court Bracton himself had been a judge for eighteen years. Many of these decisions are cited by Bracton as his authorities, especially those of two judges of that Court, already deceased—Martin Pateshull and William Rayleigh.[3] And they are cited by Bracton as precedents deserving great respect, though not perhaps as binding later judges to the extent to which precedents are binding now. But by the year 1455 it appears to have been generally understood in Westminster Hall that, if a point of law had once been decided by the Court after adequate argument and consideration, the decision was a precedent which the judges of that Court were bound to follow in similar cases.[4] In following these decisions, however, the judges often extended them. Such extensions afford one instance of what Bentham stigmatised as "judge-made law."

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[1] See an excellent article in the *Encyclopædia Britannica* (volume 28) by the late Professor Maitland, called the History of English Law.

[2] Ralph de Glanville, born before 1135; Chief Justiciar 1180; killed at the siege of Acre, 1190; see Lord Campbell's Lives of the Chief Justices, Vol. I. at p. 25.

When composing his treatise on the law of England Bracton had a "Note Book" compiled, containing transcripts of the judicial rolls of the King's Court dating as far back as 1218. This note book was freely used in the next century by Fleta, Britton, and other legal writers. But it cannot fairly be described as a law report in the modern sense of the word, as it does not record the arguments of the advocates or the reasons given by the Court for its decisions. By the time of King Edward I. there had arisen in England a separate class of professional lawyers; and professional opinion soon became one of the forces which moulded the law.

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[1] See the *Rotuli Regis Richardi*, edited by the late Professor Maitland in 1891.

[2] Henry de Bracton (*vel* Bratton) ; Justice in Eyre 1245 ; Judge of the *Curia Regis* 1249-66 ; Chief Justiciar 1265-7 ; died 1268.

[3] See Pollock and Maitland, History of English Law, Vol. I. at p. 207.

[4] See Pollock's First Book of Jurisprudence, at pp. 302, 303.

There has come down to us a continuous series of law reports running from 1307 to 1537. These are known as the "Year Books." They are written in Norman-French and record the decisions of the King's Court. The first volume contains also a few cases decided in the reign of Edward I. both in the King's Court and on circuit, which date as far back as 1292. These Year Books were not the work of paid reporters, but unofficial reports compiled from rough notes made by practitioners in court. These practitioners regularly attended the Courts and took notes of any point of law which they deemed would help them in their practice. Such notes were collected and rewritten in manuscript books (called "collections") which were handed about at the Inns of Court, and diligently read by the young "apprentices of the law;"[1] and soon arose the practice of regularly recording in book form the principal decisions of the King's judges with their reasons for the decisions and the arguments of counsel. The study of these decisions was the only method by which an accurate knowledge of the law could at this time be acquired; for the Inns of Court had not yet begun to hold those moots and readings which in the times of the Tudors did so much to make our law clear and systematic.

But from the close of the Year Books in 1537 down to the present time there has been a continuous and ever-widening stream of law reports. Several of these were the work of the most distinguished lawyers of the Tudor and Stuart periods, such as Dyer, Plowden, Coke and Levinz.[2] These reports contain decisions in which are formulated most of the great principles of our English law; they are a mine in which all who study our laws must bore with increasing energy, and in which they will find many a vein of pure gold embedded in much useless quartz.

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[1] See Year Book, 33 Hen. VI. (1454), 41a.

[2] Sir James Dyer, b. 1512, d. 1582; judge of the Court of Common Pleas, 1556, President, 1559; Reports from 1513—1582 published in French 1585; after six folio editions, translated in 1688 into English by Treby, afterwards Chief Justice of the Court of King's Bench.

Edmund Plowden, b. 1518, d. 1585; Treasurer of the Middle Temple from 1561 to 1573; built the Middle Temple Hall; published Commentaries 1571; Reports from 1550—1580.

Sir Edward Coke, b. 1552, d. 1634; Speaker of the House of Commons, 1592-3; Attorney-General, 1593-4; Treasurer of the Inner Temple, 1596; Chief Justice of the Court of Common Pleas, 1606, and of the King's Bench, 1613; Reports from 1572—1616.

Sir Creswell Levinz, b. 1627, d. 1701; Treasurer of Gray's Inn and Attorney-General, 1679; Judge of the Court of Common Pleas, 1680—1686; Reports from 1660—1697, published in folio in 1702, English translation by Salkeld in 1722.

As civilisation advanced, new causes of action arose, which our judges at first readily welcomed and found a place for in the existing legal system. By the Statute of Westminster II.[1] the clerks of the "Chancery" (which was the secretarial department of the King's Court) were expressly bidden to issue a writ in a new form, whenever a new cause of action was similar (*in consimili casu*) to any old one recorded among their forms. Under the powers conferred by this statute there sprang into existence a great variety of new actions, technically known as "actions on the case." All actions of contract, except debt and covenant, and many actions of tort, where there was no direct physical trespass, owe their origin to the elasticity with which this new remedy was applied by the judges.

But later on other new causes of action arose which were not similar to any of the old ones; and there was no formula which could be legitimately strained to cover these. The only method by which they could be brought within the ambit of the Courts of law was by means of those ingenious devices which were known as "legal fictions." A legal fiction has been defined by Sir Henry Maine as "a false averment on the part of the plaintiff which the defendant was not allowed to traverse."[2] By means of such fictitious averments a place was found for causes of action which were wholly unknown to the earlier law. Such subtlety was necessary because there existed among the older lawyers too great a reverence for the law, as they had received it, to admit of its being openly disregarded.

At last in the sixteenth century the importance of British commerce came to be recognised even in the Law Courts. Till that period our trade was mainly in the hands of foreign merchants. When any dispute occurred among these merchants, it was not brought before the Courts of common law; the King's justices indeed were expressly forbidden to take cognisance of it.[1] Such disputes were dealt with in local Courts of Staple and Pie-poudre by laymen elected by the merchants themselves to decide such matters. In these Courts was administered a kind of "peregrine" law composed of mercantile usages and customs. This body of customary law—largely of alien origin—was gradually adopted as part of the common law of England in the reigns of Queen Elizabeth and James I. Hobart, C.J., in the year 1621 expressly declared "the custome of merchants is part of the common law of this kingdome, of which the judges ought to take notice: and if any doubt arise to them about there custome, they may send for the merchants to know there custome, as they may send for the civillians to know there law."[2] And the custom of merchants is not fixed and stereotyped; it is capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce.[3] It was thus expanded and enlarged, and its principles clearly stated, by Lord Mansfield throughout the long period during which he sat as Chief Justice of the King's Bench.

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[1] 1285, 13 Edw. I., c. 34. The words of the Statute are "as often as it shall happen in Chancery that in one case a writ is found, and in a like case falling under the same right and requiring like remedy, no writ is found, the clerks in Chancery shall agree in making a writ."

[2] Ancient Law, 1906 ed., p. 30.

The law merchant with reference to bills of exchange and other negotiable securities "is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law and may thus be said to form part of it."[1] "When a general usage has been judicially ascertained and established," says Lord Campbell in *Brandao* v. *Barnett*,[2] "it becomes a part of the law merchant, which Courts of justice are bound to know and recognise."

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[1] See the Statute of the Staple, 27 Edw. III., st. 2, c. 5.

[2] *Vanheath* v. *Turner* (1621), Winch, at p. 24.

[3] *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.

Out of these discordant elements arose our common law. And side by side with it grew up its younger sister, equity. At the close of the thirteenth century the three superior Courts of common law were firmly established at Westminster and busily engaged in disposing of all ordinary causes of action. But the King was still regarded as the fountain of justice. In him and his council there yet resided jurisdiction to redress any wrongs with which the ordinary Courts were powerless to deal. Hence, whenever a private individual suffered a grievance for which no remedy or no adequate remedy existed at common law, he was wont to petition the King in Council for redress. The King usually referred such petitions to his Chancellor. This officer was at first an ecclesiastic; he was always, whether lay or ecclesiastical, the most learned man of the King's Council, and had the custody of the King's great seal; he eventually came to be "the keeper of the King's conscience." In the fourteenth century it became the rule for petitioners to address themselves directly to the Chancellor,[3] and to beg his assistance "for the love of God and in the way of charity." Then, when trusts of land became common, the Law Courts recognised only the legal owner and afforded no remedy for any breach of trust which he might commit by appropriating to his own use the profits of the land. No writ *in consimili casu* and no legal fiction could be devised to punish such a breach of confidence. So the beneficiaries naturally turned for aid to the new jurisdiction of the Chancellor. He, with the general approval of lawyers and laity alike, began to enforce by summary process the duty that lay upon the conscience of a trustee. Towards the end of the reign of Henry VIII. the Chancellor became the sole judge of a Court of Chancery and issued decrees in equity without any consultation with the common law judges.

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[1] *Per cur.* in *Goodwin* v. *Robarts* (1875), L. R. 10 Ex. at p. 346.
[2] (1846), 12 Cl. & F. at p. 805.
[3] See an Ordinance passed in 22 Edw. III.

The Court of Chancery was not started in the first instance with any idea of interfering with the Courts of law in any matter properly within their jurisdiction, or with any desire to introduce rules of equity into the ordinary common law of the land: it was originally intended merely to deal with those cases which fell outside the jurisdiction of the Courts at Westminster. But as civilisation advanced it was found that the rigid rules of the common law often worked injustice. Ancient custom had to yield to improved morality, and the Lord Chancellor assumed authority to enforce what "good conscience" required even in cases hitherto governed solely by the common law. He granted injunctions to restrain successful suitors from enforcing the judgments which they had obtained in the Courts of common law, whenever he deemed their conduct unconscientious. He exercised such control not only in cases of trust, but in many instances of fraud, accident and mutual mistake. In such cases equity was said to vary "with the length of the Chancellor's foot;" for he did what he thought right without regard to any precedent. Indeed it was long before lawyers made a habit of recording his decisions.

Subsequently, however, a respect for precedent grew up in this Court as it had done in the Courts of common law; and there was gradually evolved a body of rules, which determined in what cases the Court of Chancery would grant relief. Equity thus became a source of law. Its principles were more and more distinctly formulated under the Chancellorships of Lord Nottingham,[1] of Lord Hardwicke,[2] and later of Lord Eldon.[3] A system of equity was thus established, which at length became as rigid as the common law itself. Eventually by the Judicature Act, 1873,[1] a strenuous effort was made to fuse common law and equity into one compact body of law; and now every Court can in a proper case grant in addition to the ordinary legal remedies any relief which the Court of Chancery could formerly have given.

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[1] Henege Finch, first Earl of Nottingham, born 1621; Lord Chancellor 1673—1682; died 1682.

[2] Philip Yorke, first Earl of Hardwicke, born 1690; Chief Justice of the King's Bench 1733; Lord Chancellor 1737—1756; died 1764.

[3] John Scott, first Earl of Eldon, born 1751; Chief Justice of the Common Pleas 1799; Lord Chancellor 1801—1827 (except for a break of some months in 1806-7); died 1838.

We now come to the last source from which our law is derived, namely, legislation or statute law.[2] Legislative power is now vested in the King and Parliament; the existing law cannot be altered without the concurrence of both. The King alone can no longer make law; and a bill, which has passed through both Houses of Parliament, does not become an Act until it has received the King's assent. This is seldom, if ever, refused to any bill laid before him by the British Parliament.

It is not easy to trace the steps by which first the Lords and then the Commons acquired a share in the work of legislation. From the days of Alfred the Great to those of Henry II., the King was the only lawmaker in England. But the Saxon Kings constantly consulted the gathering of their wise men, and the Norman Kings were influenced by their court of bishops, earls and barons. This *Curia Regis*, as it was called, tacitly acquired as a matter of fact power to veto any ordinance which the King proposed to make, though its right to do so was never formally acknowledged. But the people of England were as yet wholly unrepresented when the roll of statutes commenced. Representatives of boroughs were never summoned to Parliament before 1265, though on two or three occasions previously knights of the shire were elected in the county courts to attend the King for the purpose of assessing taxation. The earliest statutes in the Revised Statute Book are the Provisions of Merton in 1235 and the Statute of Marlborough in 1267. Magna Carta does not appear anywhere in our roll of statutes; for it was a grant of liberties and privileges by King John to his people, and not an enactment of any legislative body. It was confirmed by Henry III. on his accession in 1216. In 1322 Edward II. was compelled to consent to the revocation of certain ordinances which he had recently made without the consent of Parliament, and it was expressly affirmed that henceforth "the matters which are to be established for the estate of our Lord the King and of his heirs and for the estate of the realm and of the people shall be treated, accorded and established in Parliaments by our Lord the King and by the assent of the prelates, earls and barons and the commonalty of the realm."[1] And from that time forward the enacting clause of every statute stated that it was made law either on the petition or with the consent of the commonalty. Sometimes the Commons had to fight for their liberties; more frequently they purchased them with money; but they have unquestionably acquired the predominant voice whenever any alteration of the law is under discussion. And now since the Parliament Act, 1911,[2] it is possible in certain cases for a bill to become law without the consent of the House of Lords at all.

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[1] 36 & 37 Vict. c. 66; see further, as to the effect of this Act, Book V., Adjective Law, Chaps. IV. and XII.

[2] The canon law of the Church of England is not binding on the laity. "The canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country: the burden of proving which rests on those who affirm the adoption of any portion of it in England": *per* Lord Denman, C. J., in *R.* v. *The Archbishop of Canterbury* (1848), 11 Q. B. at p. 649. And see *Middleton* v. *Croft* (1734, 1736), Lee's Cases, temp. Hardwicke, 57, 326.

There is now no doubt as to the force and effect of a statute. An Act of Parliament can do anything. It can alter the Prayer Book, define the creed of the Church of England, annul royal marriages, and even settle the succession to the Throne. Any citizen who deems a statute unjust or immoral may agitate in every constitutional manner for its repeal. But so long as it remains unrepealed he must obey it.[3]

At first, when Parliaments began to assemble, there was very little legislation; now there is too much, and the quality of the work varies inversely with the quantity produced. The earliest statutes were short and businesslike: they merely laid down a general principle, which the Law Courts were expected to carry out in detail. But the natural conservatism of the judges soon caused difficulty, as it has done occasionally in more modern times. They were devotedly attached to the old customary law, and refused to give effect to any statute which purported to alter it, unless its language was imperatively clear and express. Parliament sometimes met this difficulty by asserting—untruthfully—that a statute was merely declaratory of the common law. But later it adopted the practice of stating full details in the Act, showing precisely what it wished to change, and why, and how the change was to be carried into effect. The result was that statutes became diffuse and prolix, and this continued in later years. During the Tudor period the bulk of legislation enormously increased, and the drafting was careless and slovenly.

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[1] Revocatio Novarum Ordinationum (15 Edw. II.).

[2] 1 & 2 Geo. V. c. 13.

[3] It is strange to find Lord Coke asserting in *Bonham's Case* (1610), 8 Coke, at p. 375, that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void." This certainly is not the law to-day.

The great difficulty now in the way of legislation is want of time. The parliamentary machinery is of antiquated construction, and works slowly. Compromises have to be effected and amendments accepted in order to save time; clearness of expression has often to be sacrificed to the necessity of carrying a bill through Committee in the face of opposition. During the last fifty years obstruction has become a science. The shorter the bill, the fewer are the opportunities afforded for obstruction; but such brevity is often attained only at the risk of obscurity. Again, the Government, in its anxiety to save time, is often driven to another objectionable practice, which is called "legislation by reference." It incorporates into the bill which it is seeking to carry through Parliament numerous sections from a former Act on a somewhat different subject, with a provision that certain words in these sections are to be read as though they were certain other words, unless such an interpretation be inconsistent with the context. And yet every British subject is supposed to know the law by which he is governed!

Possibly some of these evils might be remedied if it became the rule for a bill, after it had passed through Committee, to be sent to an impartial body of experienced draftsmen for final revision before it is read a third time.[1] These gentlemen, while loyally carrying out the intentions of the Legislature, should reconcile all inconsistencies and remove all obscurities of expression in the bill; they should pay special attention to the effect produced by the amendments of private members. Further, whenever a new Act is passed which affects antecedent legislation, all the former Acts of Parliament dealing with the particular subject should be repealed and, so far as is necessary, re-enacted, so that the latest Act may contain the whole law on the subject.[2]

The phrase "common law" is used in two very different senses. It is sometimes contrasted with equity; it then denotes the law which, prior to the Judicature Act, was administered in the three superior Courts of law at Westminster as distinct from that administered by the Court of Chancery at Lincoln's Inn. At other times it is used in contradistinction to the statute law, and then denotes the unwritten law, whether legal or equitable in its origin, which does not derive its authority from any express declaration of the will of the Legislature. This unwritten law has the same force and effect as the statute law. It depends for its authority upon the recognition given by our Law Courts to principles, customs and rules of conduct previously existing among the people. This recognition was formerly enshrined in the memory of legal practitioners and suitors in the Courts; it is now recorded in the voluminous series of our law reports, which embody the decisions of our judges together with the reasons which they assigned for their decisions.

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[1] Something of this sort was done in the days of the later Plantagenet kings. At the end of a session a committee, consisting of members of both Houses and of the judges of the superior Courts, met to recast the petitions of the Commons and the King's answers thereto into the form of statutes.

[2] This has been done, for instance, in the case of the successive Acts for Prevention of Cruelty to Children, 1889, 1894, and 1904. And see the Official Secrets Act, 1911, and the Larceny Act, 1916.

At the present time, then, our law is practically derived from two sources only—precedents and statutes. Text-books, though sometimes valuable aids in discovering what precedents or statutes are material in any given question, are in themselves of no conclusive authority. Legal fictions have for the most part happily disappeared. There is now but little judge-made law. It is the duty of the judges to declare the unwritten law, to interpret the written law, but not to make new law. It is the province of the statesman, not of the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. In many instances the law expressly gives our judges a discretion in dealing with particular cases; but such discretion must be exercised judicially, and must be regulated by legal principles. "Discretion, when applied to a Court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular."[1]

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[1] *Per* Lord Mansfield, C. J., in *R.* v. *Wilkes* (1770), 4 Burr. at pp. 2539, 2540; and see the judgment of Lord Halsbury, L. C., in *Sharp* v. *Wakefield*, [1891] A. C. at p. 179.

Hence, whenever any doubtful question of law arises, the difficulty must now be solved either by searching among precedents or by studying statutes. In the next chapter we will discuss the best method of ascertaining from these sources the present law of the land.

CHAPTER IX.

HOW TO ASCERTAIN THE LAW.

BEFORE attempting to enforce the remedies which he believes himself to possess, an intending litigant should of course ascertain what are his precise legal rights. During litigation he can only obtain opinions, more or less accurate, on this matter; but at the close of the litigation he will have obtained a decision. He is naturally anxious to know beforehand what this decision will be; but this it is not always easy to foretell.

A practitioner who essays to write such an opinion should first make sure of the facts of the case on which he is advising; the presence or absence of one fact will often alter his client's legal position. He must, therefore, ascertain all the facts of the case clearly and accurately, and arrange them in strict chronological order; for so much depends upon dates. He should carefully read through every important document, and especially the correspondence which passed between the parties before any controversy arose. Having thus mastered the facts, he must proceed with due deliberation to ascertain the law applicable to such facts; and this he will find entombed either in legal decisions or in statutes, or in both.

The law of England on any given question, when once we can find out what it is, is generally reasonable and just. But the State makes no effort to promulgate the law in any clearly intelligible or readily accessible form. Hence private persons write and publish text-books. There are on any important subject at least three or four text-books of different sizes, written with different degrees of literary skill and legal knowledge, and therefore of very different value. The writer of a text-book should not merely repeat the same time-honoured phrases, the same long string of cases, the same hackneyed extracts from the same judgments; he should make some effort to give the net result of the authorities, and to re-state the law in a clear and original canon. But even where this is done the text-book is not an authority; it cannot be cited to the Court as at all conclusive on the question; it cannot strictly be cited to the Court at all, so long as the author is alive.

Any practitioner, who has acquired dexterity in the use of text-books, indexes and digests, will however soon have before him some ten or twelve reported cases, which bear more or less remotely on the question at issue. If these all agree, his task is light; but this they seldom do. And even if the cases there before him appear to be all in his favour, still there are in the library of his Inn at least two thousand other volumes of reports, in any one of which may lurk a *dictum* or a decision disastrous to his case. These his energetic opponent is at the very moment industriously searching out; and on the day of trial both series of decisions, *pro* and *con.*, will be paraded before the judge and discussed in the arguments of counsel and in the judgment of the Court.

It is in these reported decisions of the Courts, and in them only, that we find the principles of our law applied to the actual facts of everyday life—to facts, that is, differing widely in their nature, and occurring in an endless variety of novel combinations. Judicial decisions, indeed, afford the best, and oftentimes the only, evidence of what our unwritten law is; and, in arriving at these decisions, the judges are guided by established precedents and by the general principles of the law, of which such decided cases are only illustrations. When the decisions on any point appear to be in conflict, it is the duty of the judge, whenever the case before him requires it, to ascertain from the decisions themselves the general principle which underlies them all, and to state it clearly as a rule of law for the benefit of the public, who are entitled to know what is the law under which they live.

When once a clear rule of law is thus ascertained and enunciated, it becomes a precedent which must be followed in all subsequent decisions; there must be uniformity in the law. "The only use of authorities or decided cases is the establishment of some principle which the judge can follow out in deciding the case before him. There is perhaps nothing more important in our law than that great respect for the authority of decided cases which is shown by our tribunals. Were it not for that our law would be in a most distressing state of uncertainty."[1] The Court must decide the case before it on the same principles as it has decided similar cases in the past and will decide similar cases in the future. It must act in all similar cases in accordance with the same general rule; else law will cease to be a science.

A legal practitioner, then, who is constantly being asked by clients whether they shall commence or continue or defend legal proceedings, must learn two things: firstly, how to extract the principles of law from the decisions; and secondly, how to apply the appropriate principle to the facts of the case in which he is interested. He must weigh carefully each relevant case before he forms his opinion, and elicit if possible the rule of law which governs each separate decision.[2] It is unsafe to dwell upon an isolated passage which seems to tell in his favour, while the rest of the judgment does not; it may be disastrous to his client thus to divorce a passage from its context and apply it to dissimilar facts. It is also unfair to the judge, whose mind was naturally occupied with the case actually before him, and not with any hypothetical and imaginary set of facts. "Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found."[3] This does not mean, however, that a decision governs merely identical cases; it is a precedent for all cases in which the essential facts are identical. The practitioner must ascertain what facts are essential to the decision before him, and then contrast them with the essential facts of the case on which he is advising. To test whether a fact is or is not essential he must ask himself, Would the case be decided otherwise if this fact were absent?

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[1] *Per* Jessel, M. R., in *In re Hallett's Estate* (1879), 13 Ch. D. at p. 712.

[2] This is called the *ratio decidendi* of that case.

[3] *Per* Lord Halsbury, L. C., in *Quinn* v. *Leathem*, [1901] A. C. at p. 506. This rule is often thus expressed: "A judge's observation must be taken *secundum materiam*."

Having thus ascertained from each decision separately the principle which governed it, his next step is to contrast each of these decisions with others bearing on the same point. But it sometimes happens that the decisions seem to be in conflict. Often this conflict is apparent rather than real; on investigation it will be found that the essential facts of the two cases are not identical; hence decisions, which are apparently in conflict, will often be reconciled as soon as one ascertains on what facts they respectively depend. The first case may be on one side of a border line, and the second on the other. One case, for instance, may refer to a compulsory and the other to a voluntary liquidation; or in one case the female defendant may have been married before January 1st, 1883, and in the other after that date; and so any apparent discrepancy disappears.

But if the conflicting cases cannot be thus distinguished, the practitioner is face to face with this difficulty: different Courts, when dealing with identically the same facts, have laid down different rules of law. Even for this calamity well-known rules of practice have been provided. "There is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank; it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions; it does so again on the ground of judicial comity."[1] This so-called comity has, however, been formulated into rules which, though unwritten, are habitually followed by our Courts.

The most recent decision of the House of Lords on any point is binding on all Courts of inferior rank. It is also binding on the House of Lords itself. This is so, even although on the former occasion the House was equally divided.[1] "A decision of this High Court, in point of law, is conclusive upon the House itself, as well as on all inferior tribunals. I consider it the constitutional mode in which the law is declared, and that after such a judgment has been pronounced it can only be altered by an Act of the Legislature."[2] In short, the House of Lords is "a tribunal from which there is no appeal and which is bound by its own decisions."[3]

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[1] *Per* Brett, M. R., in *The Vera Cruz* (No. 2) (1884), 9 P. D. at p. 98.

The decisions of the Court of Appeal are binding on all Courts of inferior authority. They are also binding on the Court of Appeal itself. Thus Lindley, L. J., speaking of a former case, said, "It is a decision of the Court of Appeal which we should be bound to follow whether we thought it right or not."[4] But the Court of Appeal has declined to follow a decision of its own in which the Court was equally divided; for in such a case "there is no authority of the Court as such, and those who follow must choose one of the two adverse opinions."[5]

The decisions of the High Court of Justice are binding on all Courts of inferior rank in England. They will also be followed by the High Court itself unless there be some very strong reason to the contrary. "It is not proper for one Court of co-ordinate jurisdiction to refuse to follow the decision of another, merely because the Court thinks it erroneous. There must be something more. There must either be current of authority of superior, or at least co-ordinate, Courts against it, or else it must be a recent decision inconsistent with the plain terms of the statute."[6]

The Court, however, is bound only by the decision in the particular case—not by what are termed the *obiter dicta* of any of the judges who formed the Court. Such *dicta* are expressions of opinion on points immaterial to the decision of the particular case. If it was unnecessary that such an opinion should be expressed, its expression is not binding on the Court in any subsequent case, though it may receive attention as being the opinion of an eminent judge.

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[1] *Beamish* v. *Beamish* (1859—1861), 9 H. L. Cas. 274, following *R.* v. *Millis* (1843), 10 Cl. & F. 534.

[2] *Per* Lord Campbell, L. C., in *Bright* v. *Hutton* (1852), 3 H. L. Cas. at pp. 391, 392.

[3] *Per* Lord Halsbury, L. C., in *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. at p. 134. Yet contrast the decision in *G. & C. Kreglinger* v. *New Patagonia, &c., Co., Ltd.*, [1914] A. C. 25, with that in *Bradley* v. *Carritt*, [1903] A. C. 253.

[4] *Lavy* v. *L. C. C.*, [1895] 2 Q. B. at p. 581.

[5] *Per* Brett, M. R., in *The Vera Cruz* (No. 2) (1884), 9 P. D. at p. 98.

[6] *Per* Jessel, M. R., in *In re Harper and G. E. Ry. Co.* (1875), L. R. 20 Eq. at p. 43.

The opinions of some judges deserve more attention than those of others. Moreover, some reporters are more reliable than others, so that some series of reports carry more weight than others. Thus, the series still known as Modern Reports (1669—1732) is not treated with respect in our Courts. Nor is the whole of the same series always of equal value: the twelfth volume of Lord Coke's Reports, for instance, is of questionable authority; it was issued after his death and compiled by some one else from papers which Lord Coke had neither digested nor intended for the press.[1] Hence it may sometimes be necessary to read all the various reports of the same decision.[2]

Next, let us suppose that the opinion of the practitioner or the judgment of the Court depends upon the proper interpretation of a statute or of a series of statutes. Construing statutes ought to be an easier task than reconciling conflicting decisions; but this is not always so, for statutes are not always well drafted. Certain canons have been laid down for the construction of statutes. The object of these is to ascertain the intention of the Legislature—not to control that intention, or to confine it within limits which the judges may deem reasonable or expedient. The leading rules may be briefly stated thus:—

(i.) A statute must be taken to mean what it says.[3] "The best expositors of Acts of Parliament are the Acts of Parliament themselves."[4] "The meaning must be collected from the statute itself, which is the best exposition."[5] The intention of the Legislature must be gathered from the language which it has employed in the Act, and not from any extraneous source, such as statements made during the debates in either House, or conjectures as to the policy of the promoters of the bill. "The intention of the Legislature in every Act of Parliament is to be collected, not by travelling out of the Act, but from looking to the whole of the Act itself."[1]

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[1] See the remarks of Mr. Hargrave, 2 Howell's St. Tr. at p. 381; of Holroyd, J., in *Lewis* v. *Walter* (1821), 4 B. & Ald. at p. 614; and of Parke, J., in *M'Pherson* v. *Daniels* (1829), 10 B. & C. at p. 275.

[2] Contrast, for instance, the varying reports of the judgments in *Young* v. *Macrae* (1862), 32 L. J. Q. B. at p. 8; 11 W. R. at p. 63; 3 B. & S. 264; 7 L. T. 354; 9 Jur. N. S. 539; and in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. at pp. 529, 531; 7 Times L. R. at p. 174.

[3] See the judgment of Lord Esher, M. R., in *Hornsey L. B.* v. *Monarch, &c., Society* (1889), 24 Q. B. D. at p. 5; and *Algoma Central Ry. Co.* v. *R.*, [1903] A. C 478; *Sharpness New Docks* v. *Att.-Gen.*, [1915] A. C. 654; *MacConnell* v. *Prill & Co.*, [1916] 2 Ch. 57.

[4] *Per* Lord Coke in *Bonham's Case* (1610), 8 Rep. at p. 117 a.

[5] *Per* Atkins, J., in *Lord Townsend* v. *Hughes* (1676), 2 Mod. at p. 163.

Under our constitution the office of declaring the law is separated from that of making it. It is not the province of a judge to speculate upon what in his opinion may be most for the advantage of the community; it is his duty simply to construe what Parliament has said. "It is dangerous in the construction of a statute to proceed upon conjecture."[2] "We cannot speculate upon the intentions of the Legislature which are neither expressed in terms nor conveyed by implication; our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context."[3]

(ii.) If the words of the statute be plain and clear, it is not for the Court to raise any doubts as to what they mean. "We cannot assume a mistake in an Act of Parliament."[4] This is so, though "anomalous and inconvenient" results may follow.[5]

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the Legislature, it has always been held a safe means of collecting the intention to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer,[6] is 'a key to open the minds of the makers of the Act and the mischief which they intended to redress.'"[7] "If the words of the enacting part of an Act of Parliament are clear and unambiguous, they must be construed according to their ordinary meaning, even although by so doing the Act is extended beyond what is shewn to be its object by its preamble. But the preamble must always play an important part in the construction of a statute."[1] In most Acts the preamble has now been repealed by various Statute Law Revision Acts; yet it may still "be referred to as affording information of the circumstances under which the Act came to be passed, and in so far as it directly throws light upon the question of the object which the Legislature had in view."[2] So the titles to upwards of two thousand Acts of Parliament have been shortened,[3] but the original title may still be looked at. The repeal of any "title, preamble or recital" is not to "affect the operation or construction" of the statute.[4] Originally no marginal notes were entered on the statute roll, and in the present day they are no part of the statute; yet it has been said that a marginal note "is of some assistance, inasmuch as it shows the drift of the section."[5]

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[1] *Per* Wilde, C. J., in *R.* v. *Manning* (1849), 2 C. & K. at p. 903.

[2] *Per cur.* in *Barton* v. *Muir* (1874), L. R. 6 P. C. at p. 144; and see *S. E. Ry. Co.* v. *Ry. Commissioners* (1880), 50 L. J. Q. B. at p. 203.

[3] *Per cur.* in *Muller* v. *Baldwin* (1874), L. R. 9 Q. B. at p. 461; and see the judgment of Lord Haldane, L. C., in *Vacher & Sons* v. *London Society of Compositors*, [1913] A. C. at p. 113.

[4] *Per* Grove, J., in *Richards* v. *McBride* (1881), 8 Q. B. D. at p. 122.

[5] See *Clementson* v. *Mason* (1875), L. R. 10 C. P. 209, 217.

[6] *Stowel* v. *Lord Zouch* (1613), Plowden, at p. 369.

[7] *Per cur.* in *The Sussex Peerage Case* (1844), 11 Cl. & F. at p. 143; and see *Abley* v. *Dale* (1851), 11 C. B. at p. 390; *Richards* v. *McBride* (1881), 8 Q. B. D. 119; *Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1. As to cross-headings in a statute, see *Union Steamship Co.* v. *Melbourne, &c., Commissioners* (1884), 9 App. Cas. at p. 369.

(iii.) If the language of a statute is ambiguous, or if one clause in it contradicts another, still the statute must be construed as a whole, and some meaning, if possible, given to every part of it. "When two constructions are open, the Court may adopt the more reasonable of the two."[6] A construction which renders any clause or proviso nugatory or meaningless will be avoided.[7] For this purpose, if it be absolutely necessary, a word or two may be rejected, but none may be added.[8] And that construction will be the best, which gives to all the words their plain and ordinary meaning. "Even in cases where words are ambiguous and capable of two constructions, the rule is to adopt that which would give some effect to the words rather than that which would give none."[9]

Thus, by the Tyne Coal Dues Act, 1872,[10] the old coal dues were abolished, and the commissioners were empowered to levy dues, *inter alia*, of one penny per ton on "coals exported from the port." The question raised in the case of *Muller* v. *Baldwin*[1] was whether these words rendered coals taken out of the port of Newcastle by a foreign steamer for consumption during the voyage liable to this due of one penny per ton. Under the former Act the usage had been not to levy this due upon such bunker coal, but only upon coal which was exported for the purpose of being sold in foreign countries. It was held that, in the absence of anything in the Act to the contrary, the phrase "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port," and that, therefore, the due must be paid for every ton of coal "carried out of the port" on board the steamer.

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[1] *Per* A. L. Smith, L. J., in *Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. at p. 272, overruling the remarks of Kelly, C. B., in *Winn* v. *Mossman* (1869), L. R. 4 Ex. at p. 300.

[2] *Per* Hawkins, J., in *Hawke* v. *Dunn*, [1897] 1 Q. B. at pp. 583, 584; and see the judgment of Lord Macnaghten in *Fenton* v. *Thorley*, [1903] A. C. at p. 447.

[3] See the Short Titles Act, 1896 (59 & 60 Vict. c. 14).

[4] Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), s. 1.

[5] *Per* Collins, M. R., in *Bushell* v. *Hammond*, [1904] 2 K. B. 563; 73 L. J. K. B. at p. 1007.

[6] *Per* Lord Blackburn in *Countess of Rothes* v. *Kirkcaldy, &c., Commissioners* (1882), 7 App. Cas. at p. 702; and see the remarks of Jessel, M. R., in *The Alina* (1880), 5 Ex. D. at pp. 230, 231; and of Lord Selborne in *Caledonian Ry. Co.* v. *N. British Ry. Co.* (1881), 6 App. Cas. at p. 122.

[7] See the judgments of Grove, J., in *Ruther* v. *Harris* (1876), 1 Ex. D. at pp. 99, 100, and in *Williams* v. *Evans, ib.* at pp. 281, 282.

[8] *Burchell* v. *Clark* (1876), 2 C. P. D. 88; *Laird* v. *Briggs* (1881), 19 Ch. D. 22; *Symons* v. *Leaker* (1885), 15 Q. B. D. 629.

[9] *Cargo ex "Argos"* (1873), L. R. 5 P. C. at p. 153; and see the remarks of Coleridge, C. J., in *R.* v. *Most* (1881), 7 Q. B. D. at p. 251; and of Lord Esher, M. R., in *Barlow* v. *Ross* (1890), 24 Q. B. D. at pp. 388, 389.

[10] 35 & 36 Vict. c. xiii.

So, by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869,[2] jurisdiction in Admiralty matters was conferred on such county courts as might be appointed by the Lord Chancellor. The latter Act enacted that any courts so appointed "shall have jurisdiction, and all powers and authorities relating thereto, to try and determine any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of any goods in any ship, provided the amount claimed does not exceed £300." And it has been held[3] that this section gives such county courts jurisdiction in cases of claims arising out of charter-parties or other agreements for the use or hire of ships; and this although

(a) the Court of Admiralty has no original jurisdiction in such case;
(b) the county courts had at that time no jurisdiction to try claims arising out of contracts which exceeded £50;
(c) the appeal from the decision of the court so appointed would lie to the Court of Admiralty, which had no jurisdiction over contracts; and
(d) the Admiralty procedure *in rem* was thus for the first time rendered available in an ordinary mercantile action of contract.

(iv.) A statute comes into operation at the date when it receives the royal assent, unless some other date is expressly mentioned therein; it must be construed as prospective, and not as retrospective, in its operation unless a contrary intention be clearly expressed,[4] or unless the Act relates to procedure only. A man's rights depend upon the state of the law at the time when his cause of action vested in him, his remedies on the state of the law when he seeks to enforce his rights. "No suitor has a vested interest in the course of procedure."[5]

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[1] (1874), L. R. 9 Q. B. 457.

[2] 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

[3] *Cargo ex "Argos"* (1873), L. R. 5 P. C. 134; and see *R.* v. *Judge of the City of London Court,* [1892] 1 Q. B. 273.

[4] *Gardner* v. *Lucas* (1878), 3 App. Cas. 582; see the judgments at pp. 597, 601, 603.

[5] *Per* Mellish, L. J., in *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. at p. 69.

Thus section 4 of the Trade Disputes Act, 1906,[1] is not retrospective, and does not prevent the further maintenance of an action against a trade union which was commenced before the passing of the Act.[2] Again, the Prevention of Crime Act, 1908,[3] was held to apply to a person convicted of a crime committed between the date of the passing of the Act and the date of its coming into operation, the trial and conviction taking place after the latter date, the words of the Act being "a crime committed after the passing of this Act."[4]

(v.) If general words in a statute follow particular terms, they will be construed as applying only to persons or things of the same class (*ejusdem generis*) as those already mentioned. Thus a bicycle is not included in the words "coach, chariot, hearse, chaise, gig, car, chair, and every other carriage hung on springs."[5]

(vi.) If particular terms only be used and no general words follow, the statute will be construed as not applying to any other persons or things of the same class, but only to those already expressly mentioned. *Expressio unius est exclusio alterius.*

Thus the first great Poor Law Act, passed in 1601,[6] imposed rates on "lands, houses, tithes, *coal mines*, or saleable underwoods in the parish;" and it was held that no other mines could be rated. "As there may be a reason for the strict letter of the statute, and none appears for extending it beyond the letter, we have no ground or authority or pretence for giving it that extensive construction."[7]

(vii.) If one statute deals generally with a whole class of persons or things, and another statute, whether earlier or later in date, deals exclusively with a particular species of the persons or things included in that class, the special provision will restrict the general enactment and will control the particular species of persons or things.[8]

Thus, as we have seen above,[9] a general enactment that no county court can try any action arising out of a contract, if the amount claimed exceeds £50, must yield to a special provision that certain county courts can try any claim arising out of an agreement for the use or hire of any ship, even if it exceeds £50.

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[1] 6 Edw. VII., c. 47.

[2] *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310.

[3] 8 Edw. VII., c. 59, s. 10.

[4] *R.* v. *Smith*, [1910] 1 K. B. 17.

[5] *Simpson* v. *Teignmouth & Shaldon Bridge Co.*, [1903] 1 K. B. 405; *Smith* v. *Kynnersley, ib.* 788; *Plymouth, &c., Tramways Co.* v. *General Tolls Co., Ltd.* (1896), 75 L. T. 467; (H. L.) (1898), 14 Times L. R. 531; and see *Cannan* v. *Earl of Abingdon*, [1900] 2 Q. B. 66.

[6] 43 Eliz. c. 2.

[7] *Per* Lord Mansfield in *Lead Co.* v. *Richardson* (1762), 3 Burr. at p. 1344; and see *R.* v. *Bell* (1798), 7 T. R. at p. 600; *R.* v. *The Inhabitants of Woodland* (1802), 2 East, at p. 164; *R.* v. *Cunningham and others* (1804), 5 East, 478.

[8] As to the construction of private Acts, see *In re Verrall*, [1916] 1 Ch. 100.

[9] *Cargo ex "Argos," suprà.*

Again, by section 3 of the Fatal Accidents Act, 1846,[1] an action for the benefit of the wife or child of a person whose death has been caused by the wrongful act, neglect, or default of another must be commenced within twelve calendar months of the death of the deceased. By section 1 of the Public Authorities Protection Act, 1893,[2] an action against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act, must be commenced within six months. An action under the Fatal Accidents Act, 1846, was brought against the defendants, a statutory body formed to maintain a hospital, to recover damages for the death of a patient in the hospital caused by the negligent act of a nurse in the defendants' employment; the writ was issued more than six months, but less than twelve months, after the death of the deceased. Held, that the action was brought too late, and was not maintainable.[3]

(viii.) A statute which destroys, infringes or restricts any existing right will be construed strictly. "The burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to show that by express words, or by necessary implication, such an intention appears."[4] Thus cases not infrequently occur in which it is necessary for the benefit of the community as a whole to take private property away from its owner. But such an invasion of private right is never sanctioned without due inquiry, and when it is sanctioned compensation should always be granted to the owner of the property taken. A clause to this effect is almost invariably inserted in the Act which legalises the infringement. And even in the absence of any such clause, "it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it."[5]

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[1] 9 & 10 Vict. c. 93.

[2] 56 & 57 Vict. c. 61.

[3] *Markey and another* v. *Tolworth Joint Isolation Hospital District Board,* [1900] 2 Q. B. 454.

[4] *Per* Lord Blackburn in *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, at p. 208.

[5] *Per* Brett, M. R., in *Att.-Gen.* v. *Horner* (1884), 14 Q. B. D. at p. 257 ; and

(ix.) Again, any statute which derogates from the common law will be construed strictly. From very early times the judges, as we have seen,[1] were loath to admit that the common law required amendment; and therefore refused to enforce any statute which altered the common law, unless its terms were so clear and explicit as to be imperative. The same strictness will be applied to the construction of any Act which creates a new criminal offence or imposes any fresh burden on the people. "Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public."[2]

In addition to these rules the practitioner has also the Interpretation Act, 1889,[3] to assist him in construing a statute. The first Interpretation Act was brought in by Lord Brougham in 1850;[4] it was a painstaking effort in a new field, but it was far from complete, and was repealed by the present Act in 1889. This Act has done much to ensure reasonable conciseness in the wording of statutes, besides supplying many useful definitions, such as:—

"Words importing the masculine gender shall include females."[5]

"Words in the singular shall include the plural, and words in the plural shall include the singular."[5]

"The expression 'person' shall, unless the contrary intention appears, include a body corporate."[6]

"The expressions 'oath' and 'affidavit' shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression 'swear' shall, in the like case, include affirm and declare."[7]

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see *R.* v. *Smith* (1870), L. R. 1 C. C. R. 266, 271; *Barton* v. *Muir* (1874), L. R. 6 P. C. 134; *Williams* v. *Evans* (1876), 1 Ex. D. 277; *Lamb* v. *Brewster* (1879), 4 Q. B. D. 607; *Cotton* v. *Vogan & Co.*, [1896] A. C. 457.

[1] *Ante*, p. 61.

[2] *Per* Tindal, C. J., in *Parker* v. *G. W. Ry. Co.* (1844), 7 Scott, N. R. at p. 870; and see the remarks of Lord Macnaghten in *The Metropolitan Water Board* v. *The New River Co.* (1904), 20 Times L. R. at pp. 689, 690.

[3] 52 & 53 Vict. c. 63.

[4] 13 & 14 Vict. c. 21.

[5] S. 1, sub-s. 1; but see *Chorlton* v. *Lings* (1868), L. R. 4 C. P. 374.

[6] S. 2, sub-s. 1.

[7] S. 3.

CHAPTER X.

CUSTOMS.

We have hitherto spoken of the general law of the land, which binds all classes of the community and is in force throughout the whole of England and Wales. But there are certain particular customs, which have the force of law within limited areas.

There are other particular customs, which prevail only in certain trades or at certain markets and bind only persons who are engaged in those trades or who deal in those markets. We will therefore deal with the various classes of customs in the following order:—

I. Local customs, which may be divided thus:—
  (a) General local customs.
  (b) Customs of the country.
  (c) Customs of a manor.
II. Trade customs.

I. (a). GENERAL LOCAL CUSTOMS.

A local custom may be defined as a usage which "has obtained the force of law, and is, in truth, the binding law within a particular district, or at a particular place, of the persons and things which it concerns."[1] Such customs are deviations from the general law of the land, which prevail only in a particular district. "A custom in the strict legal signification of the word must be taken with reference to some defined limit or space, which is essential to every custom properly so called,"[2] and must have been in use so long that "the memory of man runneth not to the contrary;" *i.e.*, it must be impossible to prove that the custom commenced since the first year of Richard I.

Thus, the custom of gavelkind, which prevails in Kent and some other parts of the kingdom, ordains that on the death of a father intestate all his sons shall inherit his land in equal shares, and not the eldest son alone. Again, there is a custom in certain ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate in preference to all his elder brothers.[1] These customs are so well known that the Court will take judicial notice of them; it is only necessary to prove that the custom is applicable to the lands in question. And in other boroughs there is a custom that a widow shall be entitled for her dower to the rents and profits of all her husband's lands during her lifetime, whereas at the common law she is entitled for dower to only one third part of them.

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[1] *Per* Tindal, C. J., in *Tyson* v. *Smith* (1838), 9 A. & E. at p. 421.
[2] *Per* Lord Ellenborough, C. J., in *Legh* v. *Hewitt* (1803), 4 East, at p. 159.

Again, where a tenant for life is forbidden to commit waste, he may not fell timber; and by the word "timber" is meant, as a rule, oak, ash and elm trees. In Buckinghamshire and other counties beech is also timber by custom;[2] so in other places is willow. But there cannot be a custom to prevent tenants for life from cutting down larch trees, as larch trees were unknown in England before the reign of James I.[3] Agricultural and trade customs may vary, and this is for the public good. But a custom defining or restricting the rights of a limited owner of land must be immemorial.

A local custom, therefore, so far as it extends, supersedes the general law.[4] It derives its validity from long-continued usage. From such usage, it was said, the consent of those immediately affected by it might be implied. But as a matter of fact such consent was never consciously asked or given; nor is proof of any such consent necessary to the validity of the custom. The fact that the custom is inconsistent with the general law of the land will not render it bad in law. But no local custom can prevail against an express Act of Parliament. Every custom—in theory at all events—must be anterior in date to any statute, and an express subsequent statute will override any antecedent custom.[5]

Thus all local customs with regard to wills and all customs, which declare that women and children shall have rights of succession indefeasible by will, have been abrogated by statute.[6] Again, a custom to weigh 18 ounces to a pound is bad, for the statute 13 & 14 Car. II. c. 26 takes it for granted that a pound shall consist of 16 ounces.[7]

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[1] See *Muggleton* v. *Barnett* (1856), 1 H. & N. 282; 2 H. & N. 653.

[2] *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

[3] *In re Harrison's Trusts* (1884), 28 Ch. D. 220, 227; and see the dissenting judgment of Kay, L. J., in *Dashwood* v. *Magniac*, [1891] 3 Ch. at p. 379.

[4] See the remarks of Best, C. J., in *Lord Falmouth* v. *George* (1828), 5 Bing. at p. 293.

[5] *Mayor, &c., of New Windsor* v. *Taylor*, [1899] A. C. 41; but see *Lanchbury* v. *Bode*, [1898] 2 Ch. 120.

[6] The Statute of Distributions (22 & 23 Car. II., c. 10), s. 4; and 19 & 20 Vict. c. 94.

[7] *Noble* v. *Durrell* (1789), 3 T. R. 271, 274. See further, as to a custom being abrogated by statute, *Truscott* v. *Merchant Taylors' Co.* (1856), 11 Ex. 855.

(1) In order that a local custom may be legal and binding, it must have been in use in the locality for a considerable time. If any one can show that it commenced after the first year of the reign of Richard I., it is no good custom. It is not, however, necessary to produce evidence extending over so long a period. On proof of enjoyment for a much less period (*e.g.*, for twenty years or so), juries were held justified in finding, in the absence of evidence to the contrary, that the custom has existed from time immemorial.[1] And now, where a claim by custom "may be lawfully made at common law" to any right of common or other profit or benefit to be taken and enjoyed from or upon the land of any person, or "to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed or derived" upon or from the land of any person, the period of use necessary to support such a claim is regulated by sections 1 and 2 of the Prescription Act, 1832,[2] which was passed to shorten "the time of prescription in certain cases."

> "A defendant may no doubt defeat a custom by showing that it could not have existed in the time of Richard I.; but he must demonstrate its impossibility, and the *onus* is on him to do so if the existence of the custom has been proved for a long period; this was done, for instance, in *Simpson* v. *Wells*,[3] where the claim of a custom to set up stalls at the Statute Sessions for the hiring of servants was defeated by showing that such sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III. . . . Not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present unless such inference is irresistible, but it ought to presume everything that is reasonably possible to presume in favour of such a right."[4]

(2) It must be proved to have been continuous; any interruption would cause a temporary ceasing, and the revival gives it a new beginning which will be within time of memory, and thereupon the custom will be void. But this must be under-

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[1] *Jenkins* v. *Harvey* (1835), 1 Cr. M. & R. 877; cited in *Master Pilots, &c., of Newcastle-upon-Tyne* v. *Bradley* (1852), 21 L. J. Q. B. 196; *R.* v. *Joliffe* (1823), 2 B. & C. 54; *Duke of Beaufort* v. *Smith* (1849), 4 Exch. 450.

[2] 2 & 3 Will. IV. c. 71. See Disturbance of Easements, &c., *post*, pp. 565—596.

[3] (1872), L. R. 7 Q. B. 214. A different rule prevails in the case of such an immemorial custom at a fair; see the judgment of Blackburn, J., *ib.* at pp. 216, 217; and *Elwood* v. *Bullock* (1844), 6 Q. B. 383.

[4] *Per* Farwell, J., in *Mercer* v. *Denne*, [1904] 2 Ch. at pp. 555, 556.

stood to relate to an interruption of the right; for an interruption of the enjoyment of the right for only ten or twenty years will not destroy the custom. Thus if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed though they do not use it for ten years: it only becomes more difficult to prove; but if the right be anyhow surrendered for a day, the custom is quite at an end.

(3) The particular customary right must have been asserted openly and acquiesced in by the persons whom it affected. The enjoyment under it must have been peaceable, and not the subject of contention and dispute. In other words, the user must have been "as of right."

(4) The custom must also be reasonable.[1] But "a custom may be good though the particular reason of it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it."[2] A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law. Thus the customs of gavelkind and borough-English, mentioned above, are legal and binding though directly contrary to the law of descent. Again, "a custom is not unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth." Thus a "custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another in favour of fishing and for the benefit of navigation,"[3] or to take water from the well of another,[4] is a legal and binding custom. But as such customs derogate from the general rights of property, they must be construed strictly;[5] they must not be "enlarged beyond the usage."[6]

The deputy day meters of the City of London were held to be entitled by immemorial custom to the exclusive right, by themselves or their servants, of measuring, shovelling, unloading and delivering all oysters brought in any boat or vessel for sale along the river Thames to any place within the limits of the port of London, and of receiving a reasonable compensation for so doing, and the jury found that 8*s.* for every score for the first hundred bushels and 4*s.* for every score of bushels of the remainder of a cargo was a reasonable recompense to them for the labour of shovelling, unloading and delivering out the oysters.[1]

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[1] *Sowerby* v. *Coleman* (1867), L. R. 2 Ex. 96; *R.* v. *Venn* (1875), L. R. 10 Q. B. 310.

[2] 1 Bla. Com. 77.

[3] *Per* Tindal, C. J., in *Tyson* v. *Smith* (1838), 9 A. & E. at p. 421; and see *Lord Falmouth* v. *George* (1828), 5 Bing. 286; *Mercer* v. *Denne*, [1904] 2 Ch. 534; [1905] 2 Ch. 538.

[4] *Race* v. *Ward* (1855), 4 E. & B. 702; (1857), 7 E. & B. 384.

[5] See the remarks of Lord Denman, C. J., in *Rogers* v. *Brenton* (1847), 10 Q. B. at p. 57; and of Bayley, J., in *Richardson* v. *Walker* (1824), 2 B. & C. at p. 839.

[6] *Per* Cockburn, C. J., in *Muggleton* v. *Barnett* (1857), 2 H. & N. at p. 680.

(5) A local custom ought to be certain. And therefore a custom that lands shall descend to the most worthy of the owner's blood is void; for how shall this worth be determined? But a custom that lands shall descend to the next male of the blood exclusive of females is certain, and therefore good. So a custom to pay twopence an acre in lieu of tithes is good; but to pay sometimes twopence and sometimes threepence, as the occupier of the land pleases, is bad for its uncertainty.[2] A custom, however, for the inhabitants of a parish to enter upon plaintiff's enclosed field within the parish and erect a maypole therein, and enjoy on the land any lawful and innocent recreation at any time in the year, has been held reasonable and sufficiently certain.[3] So a custom to pay a reasonable sum for a certain privilege is not void merely because the fee is not definitely fixed.[4]

(6) A local custom, when thus established, becomes the law of the particular place wherein it has been shown to obtain.[5] Hence a custom to be valid must always be compulsory, and not left to the option of every man, whether he will use it or no. Therefore a custom that all the inhabitants of a particular district shall be rated towards the maintenance of a bridge would be good; but a custom that every man was to contribute at his own pleasure would be absurd and, indeed, no custom at all. For the same reason customs must be consistent with each other. Two conflicting customs cannot prevail in the same locality; for, if both are really customs, then both are of equal antiquity and equally compulsory, and this is impossible where they are contradictory.

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[1] *Laybourn* v. *Crisp* (1838), 4 M. & W. 320.

[2] 1 Bla. Com. 78; *Blewett* v. *Tregonning* (1835), 3 A. & E. 554.

[3] *Hall* v. *Nottingham* (1875), 1 Ex. D. 1.

[4] *Mills* v. *Mayor, &c., of Colchester* (1867), L. R. 2 C. P. 476, 484.

[5] *Tyson* v. *Smith* (1838), 9 A. & E. 406, 426.

I. (b). CUSTOMS OF THE COUNTRY.

Besides local customs properly so called, there are in different parts of the country certain agricultural customs existing, which, unless excluded expressly or impliedly by agreement between the parties, regulate to some extent the relation of landlord and tenant or affect the reciprocal rights of incoming and outgoing tenants. These are usually known as "customs of the country." Farm leases and agreements for tenancies are construed with reference to the agricultural customs and usages which prevail in the district. Such customs relate chiefly to modes of cultivation and compensation for improvements on quitting. Compensation for the latter may be claimed in an arbitration under the Agricultural Holdings Act, 1908.[1]

A custom of the country differs from other local customs in that it need not be shown to have existed from time immemorial. It will be established on proof of a usage recognised and acted upon in the particular neighbourhood and applicable to farms such as the one in question.[2] But a custom of the country will not be good unless it is reasonable and sufficiently definite and certain; and it will be excluded if there be an express provision in the lease which is clearly inconsistent with it.

"An agricultural custom or custom of husbandry, whether relating to the cultivation of the land or regulating the rights and liabilities of landlord and tenant in the absence of agreement, need not be an immemorial custom. . . . A custom for the tenant to take away flints turned up in the course of good husbandry and to sell them for his own profit has been held good, notwithstanding a reservation of mines and minerals, although the custom had grown up within the last thirty or forty years.[3] Indeed it would be absurd to carry back customs of this class to the reign of Richard I. Common usage in the neighbourhood is sufficient."[1]

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[1] 8 Edw. VII. c. 28, s. 6.

[2] But a usage which is merely the practice on the estate of a particular landlord is not a custom of the country: *Womersley* v. *Dally* (1857), 26 L. J. Ex. 219.

[3] The judge is here referring to the case of *Tucker* v. *Linger* (1882), 21 Ch. D. 18; 8 App. Cas. 508.

A custom that a tenant shall have the way-going crop after the expiration of his term is reasonable and good. "It is just, for he who sows ought to reap; and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly."[2]

Again, a custom that a tenant, who is bound to use a farm in a good and tenantable manner, shall be at liberty, on quitting the farm, to charge his landlord with a portion of the expenses of draining land which requires draining, is not unreasonable, though the drainage be done without his landlord's knowledge or consent.[3]

But *primâ facie* the landlord is the person liable to the outgoing tenant for seed, tillage and so forth, properly bestowed by him upon a farm, and an alleged custom or usage that the outgoing tenant shall look to the incoming tenant for payment to the exclusion of the landlord's liability is unreasonable, uncertain and prejudicial to the interests both of landlords and of tenants.[4]

I. (c). Customs of a Manor.

In early times under the feudal system, when the King granted to a subject a tract of land of any considerable size, he usually granted him at the same time certain rights and jurisdiction over those who lived upon it. In such a case the territory granted was called a "manor," and the grantee became "lord of the manor." He had, prior to 1290,[5] power to grant portions of the land to freehold tenants, who held them under him as their over-lord in return for certain services, which were fixed and certain — generally of a military nature. Indeed a manor was held not to be properly constituted unless there were at least two freehold tenants of the manor holding under the lord; for without two such tenants a court baron could not be held.[1] But many continued to be manors for all intents and purposes after all their freeholders had disappeared, though strictly they were only "reputed manors." Other portions of the manor were allotted by the lord to copyhold tenants, who held them at his will in return for services which were uncertain in their character and were therefore considered as of a baser kind, such as ploughing the land or tending the lord's cattle. A large part of the manor the lord retained for his own occupation. This was called the "demesne." Around all these spread the wastes of the manor, which were usually moorland or forest.

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[1] *Per* Chitty, J., in *Dashwood* v. *Magniac,* [1891] 3 Ch. at p. 324; see also *Dalby* v. *Hirst* (1819), 1 B. & B. 224; *Legh* v. *Hewitt* (1803), 4 East, 154; *Tucker* v. *Linger* (1883), 8 App. Cas. 508.

[2] *Per* Lord Mansfield in *Wigglesworth* v. *Dallison* (1779), 1 Sm. L. C., 12th ed. at p. 619.

[3] *Mousley* v. *Ludlam* (1851), 21 L. J. Q. B. 64.

[4] *Bradburn* v. *Foley* (1878), 3 C. P. D. 129, 135.

[5] In this year was passed the statute of *Quia Emptores* (18 Edw. I. c. 1), which put a stop to all further "subinfeudation."

A manor, then, consists of—

(a) demesne lands, which are in the occupation of the lord of the manor;

(b) freehold tenements held of the lord, over which he has certain seignorial rights;

(c) copyhold tenements, the freehold of which is still in the lord, though the copyholders practically own them;

(d) the wastes of the manor, which are also the freehold of the lord.

It was over these wastes of the manor that the copyholders gradually, by the indulgence of the lord, acquired certain rights which were formerly of little value, but which in modern times are often of great importance. Such were, for instance, *rights of common of estovers*, to cut such an amount of wood as is reasonably necessary for faggots to burn in the house, or to repair fences or instruments of husbandry; *rights of pasture*, to place horses, cows, geese, &c., on the common; *rights of turbary*, to cut turves; *rights of pannage*, to send a pig into the forest to eat acorns, &c. These rights are really personal *profits à prendre*. But they were never expressly granted by the lord; there were no circumstances from which a grant could be implied; and, just as a tenant for a term of years cannot prescribe against his landlord, so a copyholder cannot prescribe against his lord. Against strangers he can prescribe by custom, but only through his lord.[1] Neither a tenant for years nor a copyholder has any freehold, which can become a dominant tenement.[2] Yet the right undoubtedly existed, and had existed for a very long period; hence our Courts were anxious to find for it a legal origin, if that were possible. The only way of doing this was to declare that these informal *profits à prendre* were immemorial local customs.

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[1] As to this court, see *post*, p. 973.

Manorial rights, then, differ from ordinary *profits à prendre* in that the latter cannot be claimed under a local custom.[3] A vague, shifting body of persons, such as the inhabitants of a parish, vill or township, cannot acquire a right of *profit à prendre* either by grant, prescription or custom. On this ground customs for "poor householders" to carry away rotten branches,[4] or for "inhabitants" to cut underwood,[5] or to fish in a river,[6] or to take stones from a close to repair the highway,[7] have been held to be bad. But this rule does not apply to manors. "Custom is the very life of a manor." Copyholders can claim rights of common in the waste of the manor against the lord by custom, though such claims are really claims in favour of persons and not in favour of a locality. This distinction is at least as old as the reign of Queen Elizabeth. "In the common law a prescription, which is personal, is for the most part applyed to persons, being made in the name of a certain person and of his ancestors, or those whose estate he hath; or in bodies politique or corporate and their predecessors, . . . and a custome, which is local, is alledged in no person, but layd within some mannor or other place."[8]

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[1] See Scriven on Copyholds, 4th ed., p. 516, cited with approval by Scrutton, L. J., in *Derry* v. *Sanders*, [1919] 1 K. B. at p. 237.

[2] But a copyholder can claim by prescription rights over land outside a manor in respect of his copyhold tenement within the manor. Such rights will enure for the benefit of the lord, should the copyhold interest determine (*Gateward's Case* (1607), 6 Rep. 60 b).

[3] See *Mills* v. *Mayor of Colchester* (1867), L. R. 2 C. P., at p. 484.

[4] *Selby* v. *Robinson* (1788), 2 T. R. 758.

[5] *Lord Rivers* v. *Adams* (1878), 3 Ex. D. 361; *Chilton* v. *Corporation of London* (1878), 7 Ch. D. 735.

[6] *Goodman* v. *Saltash* (1882), 7 App. Cas. 633; *Tilbury* v. *Silva* (1890), 45 Ch. D. 98.

[7] *Constable* v. *Nicholson* (1863), 14 C. B. N. S. 230.

[8] Co. Litt. 113 b.

A manorial custom must be definite and certain. It must also be reasonable, or rather, must not be unreasonable. "A custom may be good though the particular reason of it cannot be assigned, for it sufficeth if no good legal reason can be assigned against it."[1]

"Thus, a custom that no man shall put his beast into the common till the 3rd of October would be good, and yet it would be hard to show the reason why that day in particular is fixed upon rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable and therefore bad: for, peradventure, the lord will never put in his, and then the tenants will lose all their profits."[1]

In *The Marquis of Salisbury* v. *Gladstone*,[2] a custom was held not unreasonable for the copyholders of inheritance in a manor without licence from the lord to dig and get clay without limit in and from their copyhold tenements for the purpose of making bricks to be sold off the manor.

It was laid down in *James* v. *Tutney*,[3] that "a custom in a manor to make by-laws for the regulation of a common or great waste, parcel of the manor, is good." But a by-law to exclude a commoner from the common would be bad, for it wholly deprives him of his right, instead of merely regulating his exercise of it.[4]

A custom for freeholders and copyholders to get from a quarry upon the wastes of the manor as much stone as they require to use on their respective tenements in the said manor, but not elsewhere, is good. "The freeholders of a manor may properly claim by prescription a right to cut turf or get gravel out of the lord's waste, and when the freeholders have, in fact, exercised such a right for many years the Court will try to find a legal origin therefor."[5]

In *Broadbent* v. *Wilkes*,[6] we have an instance of a custom being held void on the ground that it was both unreasonable and uncertain. There the custom claimed was that, when and as often as the lord of the manor or his tenants of the collieries or coal mines sank pits in certain freehold lands within the said manor, for the working of the said pits and to get coals thereout, the lord and his tenants might cast the earth, stones, &c., coming therefrom in heaps "on the land near to such pits," there to remain and continue at "his and their will and pleasure." In giving judgment Willes, C. J., remarked, "The objection that this custom is only beneficial to the lord, and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding-for the lord might take less for the land on the account of this disadvantage to his tenant. But the true objections to this custom are, that it is uncertain, and, likewise, unreasonable, as it may deprive the tenant of the whole benefit of the land; and it cannot be presumed that the tenant at first would come into such an agreement . . . . for the lord or his tenants may dig coal-pits when and as often as they please; and may, in such case, lay their coals, &c., on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them lie there as long as they please; they may be laid on the tenant's land and continue there for ever."

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[1] 1 Bla. Com. 77.

[2] (1860), 6 H. & N. 123; 9 H. L. Cas. 292; followed in *Blewett* v. *Jenkins* (1862), 12 C. B. N. S. 16, 30; and see *Duke of Buccleuch* v. *Wakefield* (1869), L. R. 4 H. L. 377, 406.

[3] (1639), Cro. Jac. 497.

[4] *De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q. B. D. 155, 158.

[5] *Per* Joyce, J., in *Heath* v. *Deane*, [1905] 2 Ch. at p. 93; and see *Coote* v. *Ford* (1900), 83 L. T. 482.

[6] (1742), Willes, 360; *S. C.* (in Error), 1 Wils. 63; with which compare *Rogers* v. *Taylor* (1857), 1 H. & N. 706; *Carlyon* v. *Lovering*, *ib.*, 784.

So, too, a custom for all customary tenants of a manor, who had gardens as part of their tenements, to dig, take and carry away from a waste within the manor "for the purpose of making and repairing grass plots in their gardens . . . such turf covered with grass . . . as often and in such quantity as occasion may require," was held bad for uncertainty. "A custom, however ancient, must not be indefinite and uncertain . . . there is nothing to restrain the tenants from taking the whole of the turbary of the common, and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom as laid but caprice and fancy."[1] But a custom to pay a year's improved value by way of fine on a copyhold estate might be good, for the value, though at present unknown, may at any time be ascertained.

II. Trade Customs.

So far we have spoken of local customs and usages, which are, for the most part, true "local laws." We proceed now to discuss certain customs which prevail only in particular trades or markets. Evidence of the existence of such customs or usages is admissible to import into contracts additional terms or incidents, which are proved to be in force in such trades or markets, provided these are not repugnant to the express terms of the contract. For the parties did not mean to put into writing all the terms of the contract by which they intended to be bound; they wished to contract with reference to known usages, which it was unnecessary to state.[2] Parol evidence, indeed, is inadmissible to show that the parties to a written contract intended to exclude the incorporation into it of such customary incidents.[1] Evidence is, however, admissible to show that by the custom of the trade or market a special meaning is attached to expressions used in the contract.[2]

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[1] *Per* Lord Ellenborough, C. J., in *Wilson* v. *Willes* (1806), 7 East, at p. 127. See also *Clayton* v. *Corby* (1843), 5 Q. B. 415.

[2] *Humfrey* v. *Dale* (1858), E. B. & E. 1004; *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; *Pike* v. *Ongley* (1887), 18 Q. B. D. 708. Compare *Wigglesworth* v. *Dallison* (1779), Dougl. 201, *ante*, p. 82.

Mercantile customs may be divided into three classes :—

(1) Customs current among all nations, and therefore accepted as part of the law of England.

(2) Customs prevailing throughout the length and breadth of this country ; these also have the force of law here and are in general judicially noticed without proof.

(3) Customs of a particular market and usages of a particular trade, which are not binding on any one outside that particular market or trade.

As for the first and second classes mentioned above, we have already pointed out that such general customs of merchants, when sanctioned by judicial recognition, became part of the law of England ;[3] or as Lord Campbell, C. J., remarked, in *Brandao* v. *Barnett*,[4] "When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognise." In that case the Court held that "the general lien of bankers is part of the law merchant and is to be judicially noticed, like the negotiability of bills of exchange, or the days of grace allowed for their payment." We will only deal here with the third class, which we will call "trade customs."

The custom of a particular market or the usage of a particular trade must be established by evidence ; the Court will not take judicial cognisance of it. It is for the jury to find the existence of the custom as a fact ;[5] it will then be for the judge to determine whether it is valid in law. To be enforceable as a custom the usage must be proved to be a binding rule within that trade or market, governing all transactions to which it is applicable, unless it be expressly excluded by the parties.[1] It is not enough to prove that such a practice has been adopted in many instances. It must be shown to be the recognised and established rule, which would be followed in cases of dispute. And then it will bind not only those who are members of the particular trade or who regularly attend the particular market, but also any one who deals with those traders or in that market, whether personally or by an agent, and whether he knows of the custom or not, unless he expressly excludes it.[2]

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[1] *Fawkes* v. *Lamb* (1862), 31 L. J. Q. B. 98.

[2] *E.g.*, to show that "the Baltic" includes the Gulf of Finland (*Uhde* v. *Walters* (1812), 3 Camp. 16), or that "1,000 rabbits" means "1,200" (*Smith* v. *Wilson* (1832), 3 B. & Ad. 728).

[3] See *ante*, p. 56.

[4] (1846), 3 C. B. at p. 530 ; approved in *London Chartered Bank of Australia* v. *White* (1879), 4 App. Cas. 413.

[5] In the City of London, however, it is sufficient if the Recorder has certified the existence of the custom ; the Court will then take judicial notice of it. See *Crosbie* v. *Hetherington* (1842), 4 M. & Gr. 933.

A trade custom will not be valid if it is contrary to the express provisions of a statute or to the general policy of our law; as, for instance, if it disregards section 1 of the statute known as Leeman's Act,[3] relating to the sale of bank shares.[4] A trade custom may, however, negative or vary any incident attached by law to a contract, which the parties themselves might have agreed to negative or vary.[5] Thus a trade custom may render a third person liable on a contract, who would not be liable under the ordinary law of the land.[6] Again, a trade custom will not be valid if it destroys the real nature of the contract into which the parties intended to enter, *e.g.*, if it converts a broker into a principal.[7] Lastly, it must be a reasonable custom. If, however, the parties have expressly agreed to incorporate a particular usage into their contract, it is immaterial whether the usage is reasonable or not.[8] And where a party knows that a custom prevails in a particular market and yet chooses to deal there without expressly excluding it, it will be very difficult for him subsequently to contend that the custom is unreasonable.

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[1] *Per* Jessel, M. R., in *Nelson* v. *Dahl* (1879), 12 Ch. D. at p. 576. A custom will be excluded if the express terms of a written agreement between the parties are inconsistent with it: *Yates* v. *Pym* (1816), 6 Taunt. 446.

[2] *Buckle* v. *Kemp* (1867), L. R. 2 Ex. 125; *Steamship Co. "Norden"* v. *Dempsey* (1876), 1 C. P. D. 662.

[3] 30 Vict. c. 29.

[4] *Perry* v. *Barnett* (1885), 15 Q. B. D. 388.

[5] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55.

[6] *Humfrey* v. *Dale* (1858), E. B. & E. 1004; *Hutchinson* v. *Tatham* (1873), L. R. 8 C. P. 482; *Pike* v. *Ongley* (1887), 18 Q. B. D. 708.

[7] *Robinson* v. *Mollett* (1875), L. R. 7 H. L. 802.

[8] *Stewart* v. *West India SS. Co.* (1873), L. R. 8 Q. B. 68, 362.

A custom, which enables a creditor of the broker to settle accounts with his principal by setting off a debt due from the broker personally, is unreasonable.[1]

The rules of the London Stock Exchange as to defaulting members are the rules of a domestic *forum*, and therefore have no influence on the rights of persons who are not amenable as members to the jurisdiction of that body.[2]

A custom for tin bounders inhabiting the county of Cornwall to use the water in their district for mining operations was recognised as good.[3]

But a trade custom differs from ordinary local customs in this respect, that it need not be immemorial; it need not date back to the first year of Richard I. "It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that, in determining whether a usage has become so well established as to be binding on the Courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Cockburn, C. J., in *Goodwin* v. *Robarts*,[4] capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade."[1]

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[1] *Pearson* v. *Scott* (1878), 9 Ch. D. 198.

[2] *Tomkins* v. *Saffery* (1877), 3 App. Cas. 213. See *Ex parte Grant, In re Plumbly* (1880), 13 Ch. D. 667, 680. As to reasonableness of customs of the Stock Exchange, see *Hamilton* v. *Young* (1881), 7 L. R. Ir. Ch. 289; *Neilson* v. *James* (1882), 9 Q. B. D. 546; *Seymour* v. *Bridge* (1885), 14 Q. B. D. 460.

[3] *Gaved* v. *Martyn* (1865), 19 C. B. N. S. 732; and see *Carlyon* v. *Lovering* (1857), 1 H. & N. 784, and the judgment of Lord Chelmsford in *Duke of Buccleuch* v. *Wakefield* (1869), L. R. 4 H. L. at pp. 400, 406, 407.

[4] (1875), L. R. 10 Ex. at p. 346.

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[1] *Per* Bigham, J., in *Edelstein* v. *Schuler*, [1902] 2 K. B. at p. 154; and see *Williams* v. *Ayres* (1877), 3 App. Cas. at p. 143; and *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658. These cases. to some extent at all events, overrule the decision in *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 374.

Chapter XI.

SUBORDINATE LEGISLATION.

Every law is made by the State, either directly or indirectly. It legislates indirectly in many different ways and by means of many different officers or bodies. A judge may be said to legislate indirectly when he recognises a mercantile custom and gives it judicial sanction. Again, Parliament frequently confers on inferior bodies the power to make orders, rules and regulations which have the force of law. It is practically compelled to do this by lack of time, caused mainly by its cumbrous and antiquated procedure.

During the reign of Queen Victoria our domestic legislation increased enormously, and Parliament could not grapple with it without assistance. The Private Bill Committees could not possibly deal with all the applications made to them by municipal corporations, harbour boards, railway companies, improvement commissioners, and every other kind of local authority; and yet such matters could only be disposed of by Act of Parliament. It was necessary, therefore, for the Legislature to delegate its authority to some of the great Government departments, at the same time keeping the final decision on each matter in its own hands. And so the "Provisional Order" was invented. Power is given to some department or other body in which Parliament has confidence—generally on the application of some local authority—to hold, if necessary, a local investigation into the circumstances, and then, if it thinks proper, to prepare a detailed scheme, which is embodied in an order. This order subsequently appears, with several others, in the schedule to a "Provisional Order Confirmation Bill,"[1] introduced by the Government department which has charge of such matters. It is, of course, still open to any body or person concerned or aggrieved (subject to the parliamentary rules as to *locus standi*) to oppose the bill in the ordinary way. But this seldom occurs; Provisional Orders are confirmed by Parliament almost as a matter of course. A Provisional Order has no validity till it is confirmed; but when confirmed, it is part of an Act of Parliament and can therefore alter, amend or repeal former local Acts.[1]

Apart from Provisional Orders, power has been conferred by the Legislature on several of the great departments of State to issue general rules and orders and on municipal and other corporations to issue by-laws. Thus the Judicature Act, 1881,[2] conferred upon a committee of our judges the power to make rules, which regulate the procedure in the High Court of Justice and in the Court of Appeal and which have all the force and effect of statutes.[3] Certain bodies have also power to make rules or by-laws under the common law. We will briefly discuss these powers under two heads:—

(i.) Orders, &c., issued by departments of State.

(ii.) By-laws.

(i.) Orders, &c., issued by Departments of State.

First and foremost among the bodies which have power to issue orders stands the Privy Council. This influential body has inherited some of the powers of the ancient Great Council (*Aula vel Curia Regis*), from which it derives its origin. Hence it has power, under the prerogative of the Crown and without any authority from Parliament, to make orders with regard to the naval and military forces, the civil service and all matters of state ceremony. But in addition power has often been conferred upon it by Parliament to issue orders on special matters affecting health, trade, education, &c.[4]

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[1] Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 303; Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 59 (6).

[2] 44 & 45 Vict. c. 68, s. 19; and see 57 & 58 Vict. c. 16, s. 4.

[3] See the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 17, as amended by the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), s. 17. There are more than 1,100 of these "Rules of the Supreme Court." They are divided into 78 orders, which are set out in a white book called "The Annual Practice."

[4] Thus by s. 234 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), power was given to the Privy Council to make orders as to the quarantine of persons on board ships, which have touched at places where there is reason to believe that some highly infectious disease or fever prevails. This power was transferred by the Public Health Act, 1896 (59 & 60 Vict. c. 19), s. 2, to the Local Government Board, which has also power under the Public Health (Regulations as to Food) Act, 1907 (7 Edw. VII. c. 32), to make regulations to prevent the importation from abroad of diseased meat.

Most of our Government departments such as the Board of Trade and the Board of Education were originally committees of the Privy Council.[1]

The Local Government Board has large legislative powers. Its orders, rules and regulations have in many cases the force and effect of a statute. This legislative power of the Board in poor-law matters is subject to a threefold control. In the first place, a copy of every general rule, order or regulation issued by it must be laid before both Houses of Parliament as soon as practicable after its publication. Secondly, the King may, by the advice of his Privy Council, disallow a general rule or any part of it, which will then cease to be of any further force or validity. Lastly, there is a power, little known and seldom, if ever, exercised, to bring any rule, order or regulation of the Board before a Court of law and have it declared illegal and *ultra vires*. But no rule, order or regulation of the Board comes into operation until fourteen days after it has been published, though it may be acted on within the fourteen days. And at any time within a year after it has been published, any person aggrieved may apply to the High Court of Justice to have the rule, order or regulation quashed. Till it is quashed, however, the rule remains in force, in spite of the application.

The Board of Trade possesses large administrative powers.[2] It deals with a vast number of most important matters, such as bankruptcy, companies,[3] copyright, trade marks, harbours, railways and canals. It regulates light railways and tramways, and grants licences to local authorities under the Electric Lighting Acts, 1882 and 1888.[4] The Board of Agriculture and Fisheries also has power to issue orders and regulations.[5] It has inherited all the powers of the Land Commissioners under the Settled Land Act, 1882,[6] and some of the powers of the Privy Council.[1] It also prescribes and regulates the muzzling of dogs and the seizure, detention, disposal and, if need be, slaughter of stray dogs. The Board of Education[2] has power to issue from time to time a Code, giving minute directions as to the management of an elementary educational school.

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[1] See Odgers on Local Government, 2nd ed., Chap. XII.

[2] See 25 & 26 Vict. c. 69, Interpretation clause.

[3] See, for instance, the Companies (Winding-up) Rules, dated March 29, 1909, made pursuant to the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), and signed by the Lord Chancellor and the President of the Board of Trade.

[4] 45 & 46 Vict. c. 56, as amended by 51 & 52 Vict. c. 12.

[5] The Board of Agriculture was created in 1889, by the 52 & 53 Vict. c. 30. It became the Board of Agriculture and Fisheries in 1903 by the 3 Edw. VII. c. 31.

[6] 45 & 46 Vict. c. 38, s. 48.

(ii.) By-Laws.

The term "by-law"[3] includes any order, rule or regulation made by any local authority or statutory corporation subordinate to Parliament. The subordinate authority must, of course, have power expressly or impliedly conferred on it to legislate on the matters to which the by-law relates; and the by-law which it makes must be reasonable in itself, it must not be retrospective nor contrary to the general principles of our law. If these conditions be satisfied, the by-law is binding on all the persons for whom, or throughout the place or district for which, that subordinate authority has power to legislate.

A by-law regularly made by a corporate body under its charter "has the same effect within its limits, and with respect to the persons upon whom it lawfully operates, as an Act of Parliament has upon the subjects at large."[4] "A by-law, though made by, and applicable to, a particular body, is still a law, and differs in its nature from a provision made on or limited to particular occasions: it is a rule made prospectively, and to be applied whenever the circumstances arise for which it is intended to provide."[5] "A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants but members of the public who come within the sphere of their operations, may be properly called by-laws."[6]

A by-law may be good as against a particular class of persons only. Thus a by-law may bind the members of the corporation making it, and yet not bind strangers. The homage of a manor may make by-laws for the management of the common lands which will bind all commoners. A railway company may make by-laws for the regulation of its traffic which will bind all its passengers and servants. The town council of a borough may make by-laws for the government of the borough which will bind all who come into it. But such by-laws will not affect the outside public or derogate from their vested rights.[1]

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[1] *E.g.*, under the Destructive Insects Act, 1877 (40 & 41 Vict. c. 68, as extended by 7 Edw. VII. c. 4), and the Contagious Diseases (Animals) Acts, 1878 to 1893, as consolidated in the Diseases of Animals Acts, 1894 to 1910 (57 & 58 Vict. c. 57; 10 Edw. VII. & 1 Geo. V. c. 20).

[2] Created in 1899 by the Board of Education Act (62 & 63 Vict. c. 33).

[3] This word originally meant the law of a borough—any rule which was in force in, and was issued for the regulation of, a borough. "By" or "burh" was the name given to any fortified town or vill.

[4] *Per* Lord Abinger, C. B., in *Hopkins* v. *Mayor, &c., of Swansea* (1839), 4 M. & W., at p. 640.

[5] *Per cur.* in *Gosling* v. *Veley* (1847), 7 Q. B., at p. 451.

[6] *Per* Lindley, L. J., in *London Association of Shipowners* v. *London, &c., Docks Committee*, [1892] 3 Ch., at p. 252.

In determining the validity of by-laws made by public representative bodies, such as county councils, the Court ought to be slow to hold that a by-law is void for unreasonableness. A by-law so made ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involves an unjustifiable interference with the liberty of those subject to it.[2]

Disobedience to a by-law is generally punished by imposing a fine; a by-law cannot be made to inflict imprisonment on an offender or to forfeit his goods, unless such a power be expressly given by statute.[3] But a chartered trading corporation may make a by-law, forfeiting the stock or shares of any member of the corporation who does not pay his calls.[4]

The power to make by-laws may be given (i.) by charter, either expressly or impliedly, (ii.) by custom, or (iii.) by statute.

(i.) *By Charter.*—A charter is a document under the seal of the Crown granting certain privileges[5] to individuals or corporations, or forming individuals into a corporation. Power to make by-laws is usually given in express terms by the charter creating the corporation. When not so expressed, still the power is deemed to have been granted by implication; for it is essential to the very existence of a corporation.[6] When there is an express grant of such a power, it can only be exercised by the persons on whom the power is expressly conferred, and in the manner and for the purposes, if any, specified. But if the charter be silent, the power rests in the members of the corporation at large for all purposes within the charter.[7]

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[1] *Mace* v. *Philcox* (1864), 15 C. B. N. S. 600.

[2] *Kruse* v. *Johnson*, [1898] 2 Q. B. 91

[3] *Clark's Case* (1596), 5 Rep. 64 a; *Kirk* v. *Nowill* (1786), 1 T. R. 118.

[4] *Child* v. *Hudson's Bay Co.* (1723), 2 P. Wms. 207.

[5] A privilege conferred by a charter is called a franchise.

[6] Selwyn's Nisi Prius, 13th ed., p. 1129.

[7] *Child* v. *Hudson's Bay Co.*, *supra.*

(ii.) *By Custom.*—Where any body, corporate or otherwise, has no charter and no statutory power to make a by-law, the existence of a custom entitling it so to do must be established by those who assert the validity of the by-law.

"A custom in a manor to make by-laws for the regulation of a common or great waste, parcel of the manor, is good," so long as it does not wholly exclude any commoner from the common. But a by-law would be bad if it wholly debarred any one of his right, instead of merely regulating his exercise of it.[1] So, too, a court leet may by prescription make by-laws to regulate their own common,[2] and a court baron may appoint a fieldreeve to look after the good order of the common.[3] A guild or trade fraternity may by custom make by-laws for the regulation of their own trade; and so may a borough.[4] But any guild or fraternity, which makes or enforces a by-law which is in diminution of the King's prerogative or against the common profit of the people, without first submitting the same to be examined and approved by the Chancellor, Treasurer and Chief Justices, or the Justices of Assize, will incur a fine of £40.[5]

(iii.) *By Statute.*—The power of making by-laws has been very freely bestowed by Parliament on local authorities and public companies. But in most cases such by-laws must be confirmed by some central authority.

(a) The council of every borough has power under section 23 of the Municipal Corporations Act, 1882,[6] "to make such by-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough." Such by-laws may be enforced by fine not exceeding £5; and they must be published in the borough at least forty days before they come into force. All by-laws made under this section for good rule and government, and not as to the prevention or suppression of nuisances, must be submitted to a Secretary of State forty days before they come into force; and if within those forty days the King, by the advice of his Privy Council, disallows any by-law, it will not come into force. All by-laws made by a local authority, under the Weights and Measures Act, 1889,[1] must be approved by the Board of Trade.[2]

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[1] *James* v. *Tutney* (1639), Cro. Jac. 497; *De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q. B. D. 155, 158.

[2] *Lord Crumwell's Case* (1573), Dyer, 322; *Earl of Excester* v. *Smith* (1669), 2 Keble, 367.

[3] *Lambert* v. *Thornton* (1697), 1 Lord Raym. 91.

[4] See the *Chamberlain of London's Case* (1590), 5 Rep. 62 b.

[5] 19 Hen. VII. c. 7, s. 1.

[6] 45 & 46 Vict. c. 50.

This power of a borough council to make by-laws is not restricted to offences which are already punishable in some method other than by summary conviction. Thus, a by-law made by a borough council, imposing a penalty on any person who shall frequent or use any street or other public place for the purpose of bookmaking and betting, is not *ultra vires* (although it creates a new offence), so long as it is aimed at persons standing on the pavement with books in their hands lying in wait for customers, and does not include a person who happens to be in the street and casually makes a bet there.[3] And a by-law made with the object of preventing any annoyance or disturbance from shooting-galleries, swing-boats, roundabouts, &c., is not bad, although it extends to land adjoining or near to a street or public place.[4] But any by-law prohibiting persons other than freemen from opening a shop or carrying on any lawful trade within a borough would now be bad,[5] though such a custom was held good in 1610.[6]

(b) A borough council has additional powers of making by-laws in its capacity as an urban district council. Urban district councils can make by-laws under several sections of the Public Health Act, 1875,[7] and the Public Health Acts Amendment Act, 1890.[8] Such by-laws do not come into force until they have been confirmed by the Local Government Board, which has power to disallow, alter or amend any of them; and an opportunity must be given to the ratepayers of inspecting the proposed by-laws before they are confirmed.[9] A penalty not exceeding £5 may be imposed for breach of any such by-law.

The Local Government Board freely exercises its power of supervising by-laws made by any local authority under the Public Health Act, 1875.[10] For instance, it has disallowed a by-law prohibiting all boys from throwing stones in the town, a by-law prohibiting persons from singing hymns in the street, a by-law forbidding strangers to bring dogs into the town, and a by-law forbidding "lounging" on Sunday afternoons!

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[1] 52 & 53 Vict. c. 21.

[2] *Ib.*, s. 28.

[3] *Burnett* v. *Berry*, [1896] 1 Q. B. 641; *Mantle* v. *Jordan*, [1897] 1 Q. B. 248; *White* v. *Morley*, [1899] 2 Q. B. 34; *Thomas* v. *Sutters*, [1900] 1 Ch. 10.

[4] *Teale* v. *Harris* (1896), 60 J. P. 744; see *Shillito* v. *Thompson* (1875), 1 Q. B. D. 12; and *Strickland* v. *Hayes*, [1896] 1 Q. B. 290.

[5] Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 247.

[6] 8 Rep. 124 b, 128 a; see *Chamberlain* v. *Conway* (1889), 53 J. P. 214; *Byrne* v. *Brown* (1893), 57 J. P. 741; *Nash* v. *Manning* (1894), 58 J. P. 718; and *Toronto Municipal Corporation* v. *Virgo*, [1896] A. C. 88.

[7] 38 & 39 Vict. c. 55; see especially ss. 44, 80, 90, 113, 141, 157, 164, 167, 169, 171, and 172.

[8] 53 & 54 Vict. c. 59, ss. 20, 23, 44.

38 & 39 Vict. c. 55, ss. 182—188. The Local Government Board has issued a series of model by-laws relating to these matters for the guidance of local authorities.

[10] 38 & 39 Vict. c. 55; and see 47 Vict. c. 12.

(c) A rural district council has some of the powers mentioned in paragraph (b) above, and may acquire others.[1]

(d) A county council has the same power as the council of a borough to make by-laws for the good rule and government of its county, and for the suppression of nuisances not otherwise summarily punishable. By-laws made under this power must be passed by a meeting consisting of at least three-fourths of the members of the council; they may be enforced on summary conviction by a fine not exceeding £5; they must be published for at least forty days before coming into operation; but no by-law may impose a penalty exceeding £5 for any one offence. No county by-law has any force within a municipal borough. Any by-law made by a county council for the good rule and government of any district in the county must be confirmed by a Secretary of State as in the case of any such by-law made by a borough council.[2] It will be construed so as to give all reasonable effect to the object which the council had in view.[3]

A county council has also power to make regulations for bicycles;[4] and as to the sale of coal under the Weights and Measures Act, 1889;[5] as to land leased for military purposes under the Military Lands Act, 1892;[6] as to light locomotives on bridges under the Locomotives on Highways Act, 1896;[7] as to sea fisheries under the Sea Fisheries Regulation Act, 1888, and the Fisheries Act, 1891;[8] as to the employment of children under the Employment of Children Act, 1903,[9] &c.

The London County Council has power to make by-laws as to very many matters affecting the metropolis under the Metropolis Management Acts, 1855 and 1862,[10] the Public Health (London) Act, 1891,[11] the London

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[1] See sections 3 and 23 of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59).

[2] Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 16.

[3] *Booth* v. *Howell* (1889), 53 J. P. 678; *Walker* v. *Stretton* (1896), 60 J. P. 313.

[4] 51 & 52 Vict. c. 41, s. 85.

[5] 52 & 53 Vict. c. 21, s. 28.

[6] 55 & 56 Vict. c. 43.

[7] 59 & 60 Vict. c. 36.

[8] 51 & 52 Vict. c. 54; 54 & 55 Vict. c. 37.

[9] 3 Edw. VII. c. 45.

[10] 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102, as amended by the 48 & 49 Vict. c. 33.

[11] 54 & 55 Vict. c. 76.

Building Act, 1894,[1] and amending Acts, the Metropolis Management Acts ment (By-laws) Act, 1899,[2] and other statutes.

(e) A parish council may make by-laws for regulating parks, recreation grounds, village greens, &c., and as to pleasure-boats on any water in such parks or recreation grounds.[3]

(f) Metropolitan borough councils derive power from the London Government Act, 1899,[4] to make by-laws under section 23 of the Municipal Corporations Act, 1882,[5] as to the good rule and government of the borough, and for the prevention and suppression of nuisances. These by-laws are to be in force only within the borough and must not be inconsistent with any by-laws made by the county council. By-laws may also be made—as to many matters affecting the metropolis—under the Metropolis Management Acts, 1855 and 1862,[6] the Public Health (London) Act, 1891,[7] and other statutes. Such by-laws, if made for the good rule and government of the borough, must be confirmed by a Secretary of State; if for the suppression of nuisances, by the Local Government Board.

(g) Since 1902 the local education authority for a county is the county council, for a county borough the county borough council, for a borough—other than a county borough—where the population is over ten thousand, the borough council, and for an urban district where the population is over twenty thousand, the urban district council. Such a local education authority may make by-laws for various purposes under the Education Acts, 1870 to 1902,[8] with the sanction of the Board of Education.

(h) Parliament has also conferred power to make by-laws on all railway companies and on many dock companies, canal companies, &c.

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[1] 57 & 58 Vict. c. ccxiii.

[2] 62 & 63 Vict. c. 15.

[3] Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 8.

[4] 62 & 63 Vict. c. 14, s. 5 (2), and Part II. of Sched. 2.

[5] 45 & 46 Vict. c. 50.

[6] 18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102, as amended by the 48 & 49 Vict. c. 33.

[7] 54 & 55 Vict. c. 76.

[8] See 2 Edw. VII. c. 42, s. 17.

The Harbours, Docks and Piers Clauses Act, 1847,[1] enables a dock company to make by-laws under its common seal for a great variety of purposes connected with the use and management of its docks and property. Penalties may be imposed for infringements of these by-laws.[2] But no by-laws (except such as relate solely to the company or its officers or servants) have effect, unless confirmed by a judge of one of the superior Courts, or by the justices at Quarter Sessions, or by such other confirming authority as may be prescribed in the special Act.[3] Moreover, notices have to be given before they are confirmed,[4] and, when confirmed, they have to be published as directed by the Act.[5] When duly made, confirmed and published, the by-laws become binding on all parties,[6] and they can only be altered by other by-laws similarly made and confirmed. A board of conservators has power to make by-laws under ss. 39 and 45 of the Salmon Fishery Act, 1873;[7] so has a canal company.[8]

When power to make by-laws is conferred by statute, a condition, as we have seen, is generally imposed that before such by-laws come into operation they must be submitted to some confirming authority, which has power to disallow them, wholly or in part. And even though a by-law has been duly approved and confirmed by the appointed authority, it may yet be held invalid by the High Court, if it be either unreasonable in itself or contrary to the general law of the land. It is impossible to lay down any general rule which will determine when a by-law is unreasonable. As Lord Russell, C. J., says in *Burnett* v. *Berry*,[9] "Authorities cited on the construction of other by-laws are of very little use in assisting the Court to decide whether the particular by-law before them is or is not good. Each must be judged by its own language."[10]

A by-law imposing a penalty on a passenger for travelling in a superior class to that for which his ticket was issued, or for using a ticket on any day for which it is not available, or which has been already used, without requiring that the act should be done with intent to defraud, is unreasonable, an intention to defraud being "the gist of any such offence."[11]

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[1] 10 Vict. c. 27, s. 83.

[2] S. 84.

[3] S. 85.

[4] Ss. 86, 87.

[5] S. 88.

[6] S. 89.

[7] 36 & 37 Vict. c. 7.

[8] 8 & 9 Vict. c. 42, s. 2.

[9] [1896] 1 Q. B. at p. 643.

[10] And see *Gentel* v. *Rapps*, [1902] 1 K. B. 160; *Wilson* v. *Fearnley* (1905), 92 L. T. 647; *Batchelor* v. *Sturley* (1905), 93 L. T. 539; *Scott* v. *Pilliner*, [1904] 2 K. B. 855.

[11] *Dyson* v. *L. & N. W. Ry. Co.* (1881), 7 Q. B. D. 32; *Huffam* v. *North Staffordshire Ry. Co.*, [1894] 2 Q. B. 821.

A town council or other local authority has power to make by-laws for the regulation of bathing on the seashore within its district.[1] But any by-law which fixes a maximum charge for towels or bathing costumes, or requires that such articles shall be provided by the proprietors of bathing machines without extra charge, is *ultra vires* and cannot be enforced. Channell, J., however, was of opinion that a by-law requiring the proprietor of bathing machines to supply some kind of bathing costume without extra charge would not be *ultra vires*, if it left him free to make an extra charge for articles of superior quality.[2]

In this Introduction we have endeavoured to state in outline the general principles of the law of England in clear and simple language, and without any reference to technical details. But this to a practising lawyer is by no means an easy task. He is so used to the language of the Courts that it is difficult for him to translate it into the language of the market and the home. Moreover, while stating these general principles broadly—and general principles must be stated broadly—he is conscious that there are to most of them many minute exceptions, chiefly created by statutes, which it is impossible for him to state in his proposition without rendering it cumbrous and pedantic, and probably also unintelligible. The reader will not expect in a piece of scene-painting the minute correctness of a miniature; he will understand that there are important exceptions to many, if not to all, of the general propositions hitherto laid down. Some of these exceptions will be found stated in the following pages.

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[1] Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), s. 69.

[2] *Parker* v. *Clegg* (1904), 2 L. G. R. 608.

SUBSTANTIVE LAW.

BOOK II.

CRIMINAL LAW.

SUBSTANTIVE Law, as we have seen, deals with rights and wrongs, Adjective Law with the procedure by which rights are enforced and wrongs redressed; in other words, Substantive Law defines our duties, Adjective Law our remedies. We shall say very little in this Book as to remedies.[1] The Substantive Law of any modern civilised State may be roughly divided into four parts:—

(i.) Rights of Property. It is beyond the scope of this treatise to deal with the law relating to real and personal property in any greater detail than has been done already in the Introduction.

(ii.) Crimes—those wrongful acts which the State punishes in the interests of the community at large.

(iii.) Torts—those wrongful acts which give the person injured by them the right to claim compensation.

(iv.) Contracts—those civil obligations which a man voluntarily incurs by some agreement, express or implied.

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[1] See *post,* Book V., Adjective Law.

Of the last three heads, it is right that we should deal first with crimes; for this is the branch of law which most affects the nation as a whole. This, too, is the branch of law which it most behoves each citizen to know, lest he unwittingly commit a crime. This, moreover, is the branch of our law in which the State speaks in most imperative tone; its edicts here are undoubtedly commands, enforced by the clearest sanction.

We proceed, therefore, to discuss the essentials of a crime.

PART I.

GENERAL PRINCIPLES OF CRIMINAL LAW.

CHAPTER I.

THE NATURE OF A CRIME.

EVERYONE, who violates the right of another or neglects his own duty to the prejudice of another or of the State, does wrong. Wrongful acts are either crimes, torts or breaches of contract.

A crime is a wrongful act of such a kind that the State deems it necessary, in the interests of the public, to repress it; for its repetition would be harmful to the community as a whole.

A tort is a wrongful act, independent of contract, which gives the person injured a right to be compensated by the wrong-doer for the injury done to him.

A breach of contract is the wrongful neglect or omission by one party to a contract to perform his promise to the other party, who is therefore entitled to be paid a debt or to receive damages.

Torts and breaches of contract, it will be observed, do not directly affect the community at large, but only the persons individually concerned; they create merely civil obligations.

In other words, the object of criminal proceedings is to punish the offender and to prevent any repetition of the offence; the object of civil proceedings is to compensate the person wronged by compelling the wrong-doer to make him satisfaction.

An act, which injures an individual and entitles him to compensation, may at the same time be such that its repetition would be harmful to society and therefore such as the State ought to repress; in other words, the same act may be both a tort and a crime.

Thus a forcible entry upon land, or an assault, is clearly indictable; it will as clearly give to the injured party a remedy by action. Again, in many cases proceedings may be taken against a libeller either by indictment or by action. An offence is committed against the public, whenever the libel has a tendency to cause a breach of the peace. A remedy by action is also accorded to the plaintiff to enable him to vindicate his character and to obtain compensation for the injury which he has sustained.

If any person has been injured by a wrongful act which is also a misdemeanour, he has a civil remedy, which he may pursue or not as he thinks fit, and whether the State prosecutes the offender or not. But if the wrongful act is a felony as well as a tort, the person against whom it was committed must wait and let the State take action first, if it wishes. He has a cause of action, but his remedy is suspended so long as the wrong-doer has not been prosecuted or a reasonable excuse shown for his not having been prosecuted. If no such excuse can be shown, any action in which damages are claimed for a felonious act will be stayed until the defendant has been prosecuted.[1] But the employer or the trustee in bankruptcy of the person upon whom the felony was committed is under no duty to prosecute, and can therefore pursue his civil remedy as he pleases.[2]

Whatever the person injured chooses to do—whether he sues for damages or not—the State will take its own independent course, and prosecute or not prosecute as the interests of the community may demand. A plaintiff may always abandon civil proceedings, if he wishes.[3] The King alone can pardon a criminal, and such pardon will not affect civil proceedings; for the King cannot deprive a plaintiff of any cause of action vested in him. On the other hand, the fact that a plaintiff abandons or settles a civil action in no way prevents the Crown from continuing the prosecution. Any attempt by a private prosecutor to compound criminal proceedings for felony already commenced is in itself a misdemeanour.[1]

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[1] *Smith and wife* v. *Selwyn*, [1914] 3 K. B. 98; *Carlisle* v. *Orr* (No. 2), [1918] 2 Ir. R. 442. That the defendant is out of jurisdiction would be a reasonable excuse: *per* Kennedy, L. J., [1914] 3 K. B. at p. 103.

[2] *Ex parte Ball, In re Shepherd* (1879), 10 Ch. D. 667; *Appleby* v. *Franklin* (1885), 17 Q. B. D. 93.

[3] Except in the case of a penal action, which is really a *quasi*-criminal proceeding: 18 Eliz. c. 5, *post*, pp. 209, 952.

On the other hand a crime does not necessarily involve a tort. A crime may be committed, though no individual is injured.

Thus, if A. unsuccessfully attempts to obtain money from B. by false pretences or forges B.'s name so clumsily that no one is deceived by it, in both cases A. has committed a crime; yet B. has no cause of action against him, for he has suffered no damage.

Again, to store gunpowder or other explosive in large quantities in a town or in close proximity to a public highway is a crime, whether an explosion takes place or not.[2] So, knowingly to send to market for sale meat which is unfit for human food is a crime, even though no one buys it.[3]

Generally speaking, the mere breach of a contract is no crime. Thus, in *R.* v. *Wheatly*[4] it was held to be no crime to sell beer short of the just measure; Lord Mansfield, C. J., pointed out that the alleged offence was, in truth, only "an inconvenience and injury to a private person" against which he might have guarded by due caution. "The selling of an unsound horse as and for a sound one is not indictable; the buyer should be more upon his guard." To be indictable the offence must be "one that affects the public." Nevertheless there are cases in which a breach of contract may amount to a crime both at common law and by statute.

Thus, if a man made a contract by which he undertook to supply the necessaries of life to a child or to a person who was imbecile or so infirm as to be unable to help himself, and neglected to perform his contract and thus caused the death of such child or person, this culpable omission would be a crime—either murder or manslaughter according to the circumstances.[5] So, to sell for human consumption meat unfit for the food of man would be no doubt a breach of contract; it is also a misdemeanour both at common law and by statute.[6]

The following acts have been made criminal offences by statute[7]:—

Where a person, employed by municipal authorities, public companies or others who have undertaken to supply gas or water, alone or with others wilfully and maliciously breaks his contract of service, knowing or having reasonable cause to believe that the probable consequence will be to deprive the inhabitants wholly or to a great extent of gas or water.

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[1] See *post*, p. 209.

[2] *R.* v. *Lister* (1857), Dearsl. & B. 209.

[3] *Shillito* v. *Thompson* (1875), 1 Q. B. D. 12, 14.

[4] (1761), 2 Burr. at p. 1127.

[5] See *R.* v. *Instan*, [1893] 1 Q. B. 450.

[6] See the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 116—119, and the Adulteration of Food, Drugs, &c., Act, 1872 (35 & 36 Vict. c. 74), ss. 2 and 3.

[7] Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), ss. 4 and 5.

Where a person wilfully and maliciously breaks his contract of service, knowing or having reason to believe that the probable consequence will be to endanger human life or cause serious bodily injury, or expose valuable property to destruction or serious injury.

In some cases the same transaction may be a crime, a tort and also a breach of contract. Thus, if a lease contains the usual covenants by the tenant that he will keep the premises in repair and yield them up at the end of the term in good repair, and the tenant on the determination of his tenancy wilfully breaks the windows and doors and makes a hole in the roof of the demised premises, he commits a breach of covenant; he also commits the tort of waste and is guilty of the misdemeanour of maliciously injuring property.

A crime, then, is the breach of a duty imposed by law for the benefit of the community at large—the breach of a duty owed to the public, and therefore a wrong done to the public. And a wrong will be done to the public, not merely where the offence causes damage or inconvenience, but also where it is of a public evil example, such as the exhibition or sale of obscene pictures and literature or any other act of public indecency. So, too, any act calculated to endanger human life or to provoke a breach of the peace will be a crime, although no death or breach of the peace should result. Again, a mere omission may sometimes be a crime; as where a man neglects his duty and thereby causes injury to another or serious inconvenience to the public.

Thus, in order to constitute wilful obstruction of a highway within section 72 of the Highway Act, 1835,[1] it is not necessary that there should be any act of commission; the offence will be complete, if the person whose duty it is to remove an obstruction caused by an accident or by some other person omits to do so after notice.[2]

Again, a signalman, who causes a collision between two trains by neglecting to alter the signals, may be guilty of manslaughter. So, it is an indictable offence for a parent who has the means of supporting his child to neglect to provide sufficient food, clothing and shelter for it whilst it is of tender years and unable to take care of itself.

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[1] 5 & 6 Will. IV. c. 50.

[2] *Gully* v. *Smith* (1883), 12 Q. B. D. 121.

It is not necessary to constitute a crime that the act committed should be in itself vicious or sinful; it is enough that the State has thought fit to forbid it. Many acts which are not in themselves morally reprehensible have for various reasons been forbidden by the State. As a rule, when the State forbids an act, it expressly declares a punishment for the offender; but if no such punishment be stated in the statute, disobedience to it is nevertheless punishable as a misdemeanour.

"Wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable by way of indictment for his contempt of the statute,[1] unless such method of proceeding do manifestly appear to be excluded by it."[2] But if a statute creates a new offence and in the same section provides a method of procedure other than by indictment in case of disobedience, the method prescribed in the section must be followed, and the person aggrieved cannot proceed by way of indictment.

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[1] *R.* v. *Buchanan* (1846), 8 Q. B. 883.
[2] 2 Hawk. P. C., c. 25, s. 4.

CHAPTER II.

THE ELEMENTS OF A CRIME.

To constitute a crime there must, as a rule, be both a guilty mind and a criminal act. The State does not punish a mere intention, however criminal, unless it is accompanied by some external criminal act; nor, speaking generally, is any act punishable unless it is done with a criminal intention. This is usually expressed in the maxim, *Actus non facit reum nisi mens sit rea*;[1] it is equally true that *mens rea* is insufficient unless it be followed by some criminal act. "The intent and the act must concur to constitute the crime."[2]

I. CRIMINAL ACT OR OMISSION.

In the first place the offender must be guilty of some criminal conduct. He must do some act which it is a crime for him to do, or he must omit to do some act which it is a crime for him not to do. In most cases the criminal does some act; but the number of crimes of omission has much increased during the last hundred years.[3] It is, however, only where there is a legal duty to act that a mere omission to act is criminal; thus it is no crime to stand by and let a man drown.

A bare intent to commit a crime is not indictable; some outward act must be superadded to constitute a crime. "The imagination of the mind to do wrong without an act done is not punishable in our law."[4]

It is true that "compassing the King's death" is treason; but such "compassing" must be made manifest by some overt act.[5]

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[1] 3 Inst. 107; as to *mens rea*, see *post*, p. 112.

[2] *Per* Lord Kenyon, C. J., in *Fowler* v. *Padget* (1798), 7 T. R. at p. 514; and see the judgment of Lord Mansfield, C. J., in *R.* v. *Scofield* (1784), Cald. S. C. at p. 403.

[3] See, for instance, the provisions which make it criminal to neglect, abandon or expose children, *ante*, p. 106, and *post*, pp. 310—313.

[4] Argument, *Hales* v. *Petit* (1562), Plowd. 259 a; and see the judgments of Lord Mansfield, C. J., and Lord Kenyon, C. J., cited above.

[5] See *post*, pp. 145, 147.

So, too, in conspiracy there must be a definite agreement between the conspirators, and such an agreement is an act.

The act of soliciting and inciting a servant to steal his master's goods is indictable, although the servant did not commit the crime; for "the solicitation is an act."[1]

"The mere possession of obscene and indecent prints is not indictable because the law will not take notice of an intent without an act," and possession is not an act; but the procuring of such prints with intent to publish them is indictable, for it is an act done; it is the first step towards committing the offence of publishing obscene prints.[2]

The existence of a criminal intention can only be demonstrated as a rule by proof of some overt act; and this overt act need not be in itself criminal or even amount to an attempt to commit a crime. The overt act only carries the prosecution over one stage of the necessary proof by establishing the element of intention. Some further act must then be proved; otherwise (except in treason) the prisoner is entitled to an acquittal.

Every attempt to commit a crime, though unsuccessful, is a misdemeanour at common law. In order to commit such a misdemeanour, the prisoner must have commenced to do, and must have done the greater part of, a series of acts, which if not interrupted would have amounted to the commission of the full crime. If a man does only one or two of that series of acts, he has shown his intent, but he has not yet been guilty of an attempt. But if, with the intention of committing that crime, he does most of the series of acts necessary for its commission, he has made an attempt to commit that crime; although he may be interrupted or voluntarily desist before the crime is actually committed. Such an attempt is justly punished even where no evil effect whatever is produced; for it is a criminal endeavour evidenced by overt acts. The exact point at which the offender's conduct amounts to a criminal attempt will depend on the circumstances of each case; but there must be an act closely approximating to the commission of the full offence. "Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."[1]

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[1] *R.* v. *Higgins* (1801), 2 East, 5; *R.* v. *Gregory* (1866), L. R. 1 C. C. R. 77.
[2] *Dugdale* v. *R.* (1853), 1 E. & B. 435.

A. resolves to burn down B.'s hay-rick. He procures a box of matches, goes to the rick and strikes a match. The wind at once blows it out. So far, no attempt has been committed.[2] But if he strikes a second match and, carefully screening it from the wind, brings it close to the rick, when it is blown out, here an attempt to burn the rick has been committed. If the least portion of the rick be consumed, he is guilty of the full offence.

Again, if A. resolves to murder B., buys a revolver, loads it and lies in wait for him, he has so far committed no crime; he has merely given evidence of a murderous intention. So if when B. approaches, A. raises his revolver and prepares to take aim at him, this, it is submitted, would not amount to an attempt. But if he places his finger round the trigger and deliberately takes aim at B. and is then seized from behind and stopped, he has probably committed an attempt, although he never fired the revolver.[3] If he pulls the trigger and the bullet passes over B.'s head, he has undoubtedly committed an attempt.

To constitute an attempt, then, there must be some act done, and an act of such a kind as would, if no interruption had taken place, have led directly to the commission of the full offence. This rule was construed formerly so strictly that it was held that if a man put his hand into the pocket of another with intent to steal whatever he could find in it, and the pocket was empty, he could not be convicted of an attempt to steal. But this is no longer law.[4]

On any indictment for any felony or misdemeanour, if it appear from the evidence that the prisoner did not complete the offence charged, but that he was guilty only of an attempt to commit it, he will not therefore be entitled to be acquitted, but may be found guilty of the attempt and punished accordingly.[5] Any attempt to commit felony may be punished with hard labour.[6]

An attempt to commit any indictable offence is a misdemeanour.[7] But many attempts have been made felonies by statute, *e.g.*, all attempts to murder (by drowning, suffocation, poison or otherwise); an attempt to discharge any kind of loaded firearms at any person, with intent to do him grievous bodily harm; an attempt to procure abortion; an attempt to endanger the safety of railway passengers; an attempt to set fire to buildings, mines, ships, crops, stacks, &c. But an attempt to commit suicide remains a common law misdemeanour, and is still triable at Quarter Sessions,[1] though punishable with hard labour.[2]

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[1] *Per* Parke, B., in *R.* v. *Eagleton* (1855), Dearsl. at p. 538, cited with approval by Lord Reading, C. J., in *R.* v. *Robinson*, [1915] 2 K. B. at p. 348.

[2] See, however, *R.* v. *Taylor* (1859), 1 F. & F. 511.

[3] Cf. *R.* v. *Duckworth*, [1892] 2 Q. B. 83; *R.* v. *Linneker*, [1906] 2 K. B. 99, which were, however, cases under a special statute (24 & 25 Vict. c. 100, s. 18.

[4] *R.* v. *Collins* (1864), 9 Cox, 497. But see *R.* v. *Brown* (1889), 24 Q. B. D. 357; *R.* v. *Ring* (1892), 61 L. J. M. C. 116.

[5] 14 & 15 Vict. c. 100, s. 9.

[6] 3 Geo. IV. c. 114.

[7] No penalty can be imposed for an attempt to commit an offence which is only punishable summarily.

II. GUILTY MIND.

"It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression *mens rea*,"[3] that is, "a guilty mind." With this essential element of a crime we will deal under four separate heads:—

1. Criminal Intention.
2. Criminal Negligence.
3. Special Intent and Guilty Knowledge.
4. Malice.

We will then proceed to discuss

5. Cases in which there is no guilty mind owing to some mental incapacity or defect of the will, judgment or understanding of the accused, or by reason of coercion, or of some honest mistake of fact.

(1) *Criminal Intention.*

A criminal intention is an intention to do an act which by the law of the land is criminal. It makes no difference that the criminal does not know what the law of the land is. He may think that the act which he intends to do is only a tort, or is even a lawful act; nevertheless, if it be a crime, he has formed a criminal intention. Ignorance of our law is no excuse, even for a foreigner who is only temporarily within our shores. An intent to do any act which is, in fact, criminal is sufficient.

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[1] See *post*, Part III., Chap. V., Acts endangering Human Life.
[2] *R.* v. *Mann*, [1914] 2 K. B. 107.
[3] *Per* Cave, J., in *Chisholm* v. *Doulton* (1889), 22 Q. B. D. at p. 741.

But what is an intention, and how does it differ from a motive?

A man's intention is his determination to do or not to do a particular act; his motive is his reason for forming that determination. He intends to do that which he means and tries to do; his motive is what makes him intend to do that act—it is the spur which stimulates him to action. On the question of "guilty" or "not guilty" our law as a rule disregards the prisoner's motives, though they may affect the amount of the punishment.

The criminal law regards the prisoner's acts; from these it infers his intention. But it is not so easy to divine his motive; to discover that, it is generally necessary to inquire into all the surrounding circumstances, including what he said or did on other occasions. The absence of any apparent motive may be some ground for urging that the prisoner is insane, or that there has been a mistake as to identity and that the prisoner is not the person who committed the crime in question. But if a man, who is of full age, sane, sober, and free either to act or abstain from acting, is proved to have done an act which is criminal, he is liable, whether his motive was good or bad, or whether he had none. He has done an act which is forbidden by our law, and it will be no defence for him to urge that he had a laudable motive, or even that he conscientiously believed on religious grounds that it was his duty to do the act.

It is the intention and not the motive which gives in law the character and quality to an act. If a man intends to do one thing, but in fact does another, he will be judged by what he did and not by what he intended to do. He may thus be liable for results which he never desired or even contemplated. "The intention to do the act exists for all criminal purposes where it is wilfully done, although the act itself was merely intended as a means of obtaining some ulterior object."[1]

If a man steals a loaf of bread to feed his starving children, he nevertheless commits larceny.

If a man writes and publishes a book with the object of exposing the errors of the Church of Rome, and it contains obscene passages, he is guilty of the misdemeanour of publishing an obscene libel.[2]

A man takes a horse from the owner's stable without his consent. If he intends fraudulently to appropriate it for his own benefit, he is guilty of theft. If he intends to use it for some temporary purpose of his own and then to return it to the owner, he commits a trespass only. If he takes the horse as a distress for rent due from its owner, he commits neither a crime nor a tort. In each of these cases the act done is substantially the same; the intention of the person doing it mainly determines the legal quality of the act.

To constitute a crime, then, there must in most cases be both a criminal intention and a criminal act. But it is not necessary that there should be an intention to do the particular act that is in fact done. An intent to do any criminal act is sufficient. But the accused must intend to do some act which, if he thought about it, he would know to be legally or morally wrong, and which is in fact criminal by the law of the land.

It was an offence under the Local Government Act, 1858,[3] to fabricate any voting paper. The respondent was summoned before justices of the peace for fabricating the voting paper of one Edward Richards. Mrs. Richards in her husband's absence made her mark at the foot of the paper in the presence of the respondent, who then witnessed the mark, describing it as the signature of Mr. Richards, and wrote the initials, E. R., against the name of the candidate for whom the vote was intended. The justices found as facts that Mrs. Richards had authority to put her husband's name to the paper, and that the respondent *bonâ fide* believed this to be the case, and dismissed the charge. On appeal it was held that *mens rea* was necessary to constitute an offence under the section, and that, as the respondent had no criminal or unlawful intention, the justices had rightly dismissed the summons.[4]

Mrs. Tolson was married on September 11th, 1880. She was deserted by her husband on December 13th, 1881. She and her father on inquiry learned from her husband's elder brother and from general report that he had gone down on a ship bound for America. On January 10th, 1887, believing herself a widow, she married again; and in December, 1887, Tolson reappeared. The Court for Crown Cases Reserved held that Mrs. Tolson was not guilty of bigamy, as she had no criminal intention; for when she re-married she honestly and on reasonable grounds believed that her husband was dead.[1]

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[1] Criminal Law Commissioners, 4th Rep. p. 15.

[2] *R.* v. *Hicklin* (1868), L. R. 3 Q. B. 360; *Steele* v. *Brannan* (1872), L. R. 7 C. P. 261.

[3] 21 & 22 Vict. c. 98, s. 13, sub-s. 5 (now repealed).

[4] *The Aberdare Local Board of Health* v. *Hammett* (1875), L. R. 10 Q. B. 162.

If A. shoots at a man who is approaching him because he believes him to be his enemy B. and kills him, he is guilty of murder, although he subsequently discovers that the man he has killed is his friend C., or an entire stranger. Such a mistake of identity makes no difference in the quality and magnitude of the offence or in the amount of punishment which it deserves.

It is not always easy, however, for the prosecution to establish the existence of an intention in a man's mind. It is always for the jury to determine whether the prisoner had a criminal intention or not. They must take into their consideration all the surrounding facts and circumstances of the case; but they generally infer a man's intention from his acts and words. In some cases, however, the existence of circumstances which suggest a possible motive may be material. In all cases the absence of any motive whatever for the crime will tell in the prisoner's favour. Too much meaning must not be attached to a man's words, even though they amount to a threat to commit a crime; they may have been spoken in anger or excitement or under the influence of drink; they may be only words of coarse abuse. A man's acts are the best index to his intention. Such acts need not be criminal in themselves; they may be only the external "overt acts," which make manifest what is passing in the mind.

In inferring a man's intention from his acts the judge or jury derives assistance from the well-known rule of our law that "Every man must be presumed to know and to intend the natural and probable consequences of his act." This presumption is no doubt rebuttable in certain cases. Thus, if the accused can show that the consequence which has in fact resulted, though physically inevitable, was not in the particular case an obvious result of his act, or if he can show that the result which has happened was probable only when certain circumstances co-existed and that he was not aware of the existence of such circumstances, then in both these cases the presumption is rebutted, and he cannot be held to have intended that result. Again, if he can satisfy the jury that the possibility of such a result never occurred to his mind, then—although such heedlessness will probably render him liable to a charge of criminal negligence[1]—he cannot be held to have intended that result. But if he was aware that certain consequences might follow the act which he contemplated doing, and yet deliberately proceeded to do the act, he must be taken to have intended those consequences to follow, even though he may have hoped that they would not.[2]

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[1] *R.* v. *Tolson* (1889), 23 Q. B. D. 168.

Again, the presumption will be rebutted by proof that the accused at the time he committed the act had not a mind capable of forming an intention, *e.g.*, that he was mad, or asleep, or dead drunk,[3] or that he acted under coercion which he could not resist, or under a *bonâ fide* mistake of fact, which put an entirely different complexion on his act. In all these cases the mind of the accused does not "go with his act;" but the burden of proving such facts as somnambulism, lunacy, duress or mistake lies on the accused. For the law presumes that every one of full age knows what he is doing, knows right from wrong, and knows (and therefore intends) the natural consequences of his act.

Thus, where the defendant was indicted for creating a nuisance and it was contended on his behalf that, to render him liable, the prosecution must establish one of two things—either that his object was to create a nuisance, or that the nuisance was the necessary and inevitable result of his act—Littledale, J., answered, "If it be the probable consequence of his act, he is answerable, as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it."[4]

"If a trader make a deed which necessarily has the effect of defeating or delaying his creditors, he must be taken to have made the deed with that intent."[1]

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[1] See *post*, p. 119.

[2] This is what Bentham called "Indirect intention."

[3] *Per cur.* in *R.* v. *Meade,* [1909] 1 K. B. at p. 899.

[4] *R.* v. *Moore* (1832), 3 B. & Ad. 184, 188 ; cited by Blackburn, J., in *Haigh* v. *Town Council of Sheffield* (1874), L. R. 10 Q. B. at p. 107.

There are some cases, however, in which the terms of a statute expressly make a particular act criminal, and throw upon the accused the *onus* of proving that his intent was innocent. Thus, it is a misdemeanour for a bankrupt not to deliver up all his property to his trustee, "unless the jury is satisfied that he had no intent to defraud;" and the burden of so satisfying the jury rests upon the bankrupt.[2]

A chemist by mistake mixes a poisonous drug in the medicine which he is preparing for a sick child. The child's mother administers to it that medicine, believing it will do the child good. She intends to administer that medicine; but she does not intend to poison her child, although that in this case is the natural and necessary consequence of her act.

A man climbs up into a railway signal box and pulls a lever. The natural and necessary consequence of such an act at such a time is that an express train is diverted into a siding and comes violently into collision with a goods train, the guard of which is killed. The man was not aware that this would be the result of his act, so it cannot be said that he intended to cause the collision; yet he is guilty of manslaughter.

On the other hand, there are cases in which the words of a statute are so strong as to render criminal any act in contravention of it, though done without any guilty knowledge and without any criminal intent. "We have had quoted the maxim that in every criminal offence there must be a guilty mind; but I do not think that maxim has so wide an application as it is sometimes considered to have. In old time, and as applicable to the common law or to earlier statutes, the maxim may have been of general application; but a difference has arisen owing to the greater precision of modern statutes," which renders it "necessary to look at the object of each Act that is under consideration to see whether and how far *mens rea* is of the essence of the offence created."[3] If, then, the words of a modern statute amount to an absolute prohibition of a certain act without any reference to the state of mind of the actor, *mens rea* is not an essential ingredient in the offence; and in such a case any inquiry as to the intent which actuated the accused would be immaterial —except perhaps with a view to mitigation of punishment.

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[1] *Per cur.* in *Graham* v. *Chapman* (1852), 12 C. B. at p. 103.

[2] The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11; *R.* v. *Thomas* (1869), 11 Cox, 535; *R.* v. *Bolus* (1870), 23 L. T. 339.

[3] *Per* Stephen, J., in *Cundy* v. *Le Cocq* (1884), 13 Q. B. D. at p. 210.

The defendants assaulted a man who, though in plain clothes, was a police officer engaged in the execution of his duty. They were not aware that he was so engaged; nevertheless, they were convicted of assaulting a police officer in the execution of his duty. The act which they did was wrong in itself, and the fact that they did not know that the police officer whom they assaulted was then engaged in the execution of his duty afforded them no defence.[1]

By 24 & 25 Vict. c. 100, s. 55, it is a crime for any one to "unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father." The defendant did take an unmarried girl under sixteen out of the possession and against the will of her father. The girl assured him that she was over sixteen; she looked that age; and the defendant *bonâ fide* believed that she was above sixteen years of age. But it was held that this belief afforded him no defence, as she was in fact under that age. The wrongdoer in such a case acts at his peril.[2]

By 8 & 9 Vict. c. 100, s. 44, it is a misdemeanour for any person to receive two or more lunatics into a house not duly licensed under the Act, and not being a duly registered hospital or an asylum. The defendant, Mrs. Bishop, did receive several patients who were lunatics into her private house, which was not duly licensed; but the jury found that she *bonâ fide* and on reasonable grounds believed that they were not lunatics. It was held by the Court for Crown Cases Reserved that such belief was immaterial, and that she was rightly convicted.[3]

By section 13 of the Licensing Act, 1872,[4] "if any licensed person sells any intoxicating liquor to any drunken person," he commits an offence punishable summarily. The defendant sold intoxicating liquor to a drunken person who had given no indication of intoxication, and without being aware that the person so served was drunk. It was held by the Divisional Court that knowledge of the condition of the person served with liquor was not necessary to constitute an offence under this section. Stephen, J., said, "I am of opinion that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person, and that the existence of a *bonâ fide* mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed." [5]

By the Fertilisers and Feeding Stuffs Act, 1893,[6] if a person, who sells any article for use as a fertiliser of the soil or as food for cattle, "causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser," he is liable on summary conviction to a fine of £20. The defendants had described certain food sold by them as containing 58 per cent. of oil albumenoids, whereas it in fact contained only 51 per cent. Their analyst had certified to them that it contained over 60 per cent., and they honestly believed this to be the correct percentage when they sold it. The justices dismissed the summons on the ground that there was no evidence of guilty knowledge on the part of the defendants. But on a case being stated the Divisional Court held that guilty knowledge was not a constituent element of the offence created by the Act, and that the defendants ought to be convicted.[1]

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[1] *R.* v. *Forbes and Webb* (1865), 10 Cox, 362.

[2] *R.* v. *Prince* (1875), L. R. 2 C. C. R. 154. Contrast this decision with those in *R.* v. *Tolson* (1889), 23 Q. B. D. 168; *ante*, p. 115; *R.* v. *Green* (1862), 3 F. & F. 274; and *R.* v. *Hibbert* (1869), L. R. 1 C. C. R. 184.

[3] *R.* v. *Bishop* (1880), 5 Q. B. D. 259.

[4] 35 & 36 Vict. c. 94.

[5] *Cundy* v. *Le Cocq* (1884), 13 Q. B. D. 207, 209.

[6] 56 & 57 Vict. c. 56, s. 3, sub-s. 1 (b).

But the law is not always quite so strict. By section 16, sub-s. 2, of the Licensing Act, 1872,[2] "if any licensed person supplies any liquor or refreshment . . . to any constable on duty, he shall be liable to a penalty. . . ." In *Sherras* v. *De Rutzen*,[3] the accused did supply liquor to a constable on duty; but he *bonâ fide* believed that the constable was off duty, and the latter had in fact removed his armlet before entering the public-house. The accused was convicted, and his conviction was upheld on appeal to Quarter Sessions; but this Court consented to state a case for the opinion of the Divisional Court, and the conviction was quashed. Day, J., expressed the opinion "that it would be straining the law to say that this publican, acting as he did in the *bonâ fide* belief that the constable was off duty, and having reasonable grounds for that belief, was nevertheless guilty of an offence against the section, for which he was liable both to a penalty and to have his licence indorsed."

Again, where intoxicating liquor was knowingly sold to a child under fourteen in a bottle neither corked nor sealed, as is required by section 2 of the Intoxicating Liquors (Sale to Children) Act, 1901, by a servant of a licensed person contrary to the express orders and without the knowledge of his master, it was held that the master, who at the time of the sale was himself in another part of the bar, which was crowded, could not be convicted of "knowingly allowing" such sale.[4]

So where the appellant was charged under section 27 of the Sale of Food and Drugs Act, 1875,[5] with giving a false warranty in writing to a purchaser in respect of an article of food sold by him, which warranty he did not know and had no reason to believe to be false, it was held that he was not liable to be convicted.[6] "Where it is sought to be shown that the Legislature means to punish without requiring proof of moral guilt, such an intention must be very clearly expressed."[7]

(2) *Criminal Negligence.*

A guilty mind is, as we have seen, in general essential to the legal conception of a crime. It may exist not only where the mind is actively in fault, but also where the mind is as it were passively to blame, *e.g.*, for recklessness, heedlessness or want of due caution. The criminality consists in wilfully or negligently incurring the risk of causing loss or suffering to others. In the preceding pages of this chapter we have spoken only of the wilful commission of a criminal act. In such a case there is only one question which can arise as to the attitude of the actor's mind, namely, Did he or did he not intend to do that act? But it is often also a crime to omit to do a certain act; and in connection with such criminal omission the term *mens rea* takes a wider and a twofold meaning.

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[1] *Laird* v. *Dobell*, [1906] 1 K. B. 131; and see the Destructive Insects and Pests Order, June 18th, 1908, made under the Acts of 1877 and 1907 (40 & 41 Vict. c. 68; 7 Edw. VII. c. 4), in Statutory Rules and Orders, 1908, p. 306.

[2] 35 & 36 Vict. c. 94.

[3] [1895] 1 Q. B. 918, 921.

[4] *Emary* v. *Nolloth*, [1903] 2 K. B. 264.

[5] 38 & 39 Vict. c. 63.

[6] *Derbyshire* v. *Houliston*, [1897] 1 Q. B. 772.

[7] *Per* Hawkins, J., *ib.* at p. 776.

It may be that the prisoner deliberately resolved not to do an act which the law required him to do; if so, he intended to do that which by the law of the land was criminal, and such an intention is *mens rea.*

If, however, the omission was not deliberate, but the result only of some blunder, or of some inattention or heedlessness, or of sheer inability to do the act, he may be free from the imputation of *mens rea.* Hence nice questions arise as to the degree of heedlessness or negligence which will be regarded in our law courts as criminal. An amount of negligence which would entitle an injured plaintiff to damages in a civil action will often be insufficient to render the defendant criminally liable. On the other hand, utter indifference to the consequences of an act *primâ facie* criminal, and recklessness as to whether such consequences may or may not follow, clearly indicate a guilty mind.

Thus it has been held that merely suffering trees to grow so as to obstruct a highway is not a "wilful obstruction" within section 72 of the Highway Act, 1835.[1]

Again, under an old statute[2] any person who wilfully threw any soil or rubbish into any part of a certain river rendered himself liable to a fine. But where a tanner in the course of his business discharged his refuse into the river as he had done for years past, it was held that he was wrongly convicted. "The refuse was not 'wilfully' thrown in within the meaning of the clause: for it was discharged in the course of carrying on a lawful trade, and, as it appears, in the exercise of a supposed right; 'wilfully' appears to me in this section to mean 'wantonly' or 'causelessly.'"[1]

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[1] 5 & 6 Will. IV. c. 50; *Walker* v. *Horner* (1875), 1 Q. B. D. 4.
[2] 14 Geo. III. c. 96.

For one man to point at another a gun which he has good reason to believe is not loaded is not criminal; but to point at another a gun which for all he knows is loaded, or is just as likely to be loaded as not, is criminal if it is, in fact, loaded and the other person within range.[2]

If a father is penniless and therefore unable to procure food or clothing for his children, he cannot be accused of criminal neglect.[3]

A. unlawfully strikes B., but without any intention of killing him or of doing him grievous bodily harm. But B. is suffering from heart disease and dies in consequence of the blow. A. commits manslaughter, although he was ignorant of the condition of B.'s health. But if A. had only laid his hand gently on B. to attract his attention and by doing so startled and killed him, A.'s act would be no offence at all.

(3) *Special Intent and Guilty Knowledge.*

In some cases, however, it is not sufficient to prove that the prisoner did a criminal act and that he did it with *mens rea*. The law requires a particular intent to constitute the crime, such as an intent to do grievous bodily harm or an intent to defraud creditors. In those cases it is not sufficient to prove that the prisoner did the act; the prosecutor must go further and prove that he did it with the special intent alleged. It is not enough to rely upon the ordinary *mens rea*, which may be inferred from the mere fact that the prisoner did the act. The jury must find the special intent, and to enable them to do this they must take into consideration all the surrounding circumstances—the means which he employed to attain his end, the time and place selected for the commission of the act, even the motives which actuated him and induced him to commit the crime.

Thus, where a prisoner is indicted for the felony of wounding with intent to do grievous bodily harm, the nature of the instrument used and the part of the body wounded must especially be taken into consideration in determining the precise nature and quality of the offence. If after considering these circumstances the jury are not satisfied that the prisoner intended to do grievous bodily harm, they can find him guilty only of the misdemeanour of unlawfully and maliciously wounding.

Again, a man cannot be convicted of burglary unless the jury are satisfied that he broke and entered the dwelling-house with intent to commit a felony therein. If he entered only to gain shelter for the night or to study the owner's books without his permission, he is not guilty of felony.

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[1] *Per* Bramwell, B., in *Smith* v. *Barnham* (1876), 1 Ex. D. at p. 423.

[2] *R.* v. *Jones* (1874), 12 Cox, 628; and see *Anon.*, *post*, p. 277.

[3] But see s. 12 (1) of the Children Act, 1908 (8 Edw. VII. c. 67); and see *post*, p. 293.

A railway passenger who travels in a superior class to that for which his ticket was issued, or who uses a ticket on any day for which it is not available, cannot be convicted of a criminal offence unless it be proved that he did so with intent to defraud, and this although the by-law under which he is prosecuted is silent as to the necessity of any such intent.[1]

There are cases, however, in which "the thing speaks for itself." Thus a prisoner was convicted under a repealed statute for setting fire to a mill with intent to injure the occupier. No evidence was given at the trial from which an intent to injure any one might be inferred other than the mere act of setting fire to the mill. Nevertheless, the Court for Crown Cases Reserved confirmed the conviction, because "a party who does an act wilfully necessarily intends that which must be the consequence of the act."[2]

Again, in many cases it is not enough for the prosecution to prove that the prisoner did the act complained of and that he did it unlawfully or with an improper intention; evidence must be given in addition to establish that, at the time when the prisoner did the act, he knew certain material facts which rendered his conduct more heinous.[3] This is especially the case whenever the prisoner is charged with any kind of fraud, for the burden of proving fraud always lies heavily upon him who alleges it.

When a man is charged with obtaining goods by false pretences, the prosecution must show not merely that what the accused said was false, but also that it was false to his knowledge. So no one can be convicted of uttering a forged document or of passing bad coin without proof that he knew the document to be forged or the coin to be bad. Again, on an indictment for receiving stolen goods knowing them to have been stolen, the burden of proving affirmatively that the prisoner knew the goods to have been stolen lies on the prosecution.[4] On the other hand, it is not necessary, in order to support a charge of bigamy, for the prosecution to prove that at the time of the second ceremony the prisoner knew that his wife was still alive.

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[1] *Dyson* v. *L. & N. W. Ry. Co.* (1881), 7 Q. B. D. 32; *Huffam* v. *North Staffordshire Ry. Co.*, [1894] 2 Q. B. 821.

[2] *R.* v. *Farrington* (1811), R. & R. 207; and see *R.* v. *Haughton* (1833), 5 C. & P. 559; *R.* v. *Horsey* (1862), 3 F. & F. 287; *R.* v. *Child* (1871), L. R. 1 C. C. R. 307; *R.* v. *Serné* (1887), 16 Cox, 311.

[3] See *Core* v. *James* (1871), L. R. 7 Q. B. 135; *R.* v. *Harvey* (1871), L. R. 1 C. C. R. 284. Contrast the decisions in *R.* v. *Forbes and Webb* (1865), 10 Cox, 362, and *Cundy* v. *Le Cocq* (1884), 13 Q. B. D. 207, with that in *Sherras* v. *De Rutzen*, [1895] 1 Q. B. 918; *ante*, pp. 118, 119.

[4] But see the Larency Act, 1916 (6 & 7 Geo. V. c. 50), s. 43 (1), *post*, p. 384.

(4) *Malice.*

Again, there are some cases in which it is not enough for the prosecution to prove *mens rea*; it must in addition prove malice. Malice is the most unsatisfactory term in our legal vocabulary; it is used in a great variety of different meanings, each of which it is hard to state in a definition at once precise and terse. But in all these cases the word "malice" means something more than *mens rea*; and in nearly all these cases, if not in all, it consists in doing wrong intentionally and from some improper motive. Malice as a rule implies the existence of some direct purpose in committing the crime, and such purpose must be either unlawful or immoral; in other words, there must be a bad motive as well as a criminal intention.

Much of the difficulty which a modern lawyer has in dealing with the word "malice" is caused by the wholly unnecessary invention towards the end of the seventeenth century of a fictitious entity called "malice in law." That difficulty we have endeavoured in these pages to avoid by never using the phrase "malice in law" and by restoring the word "malice" to its earlier meaning. There is not now and never was such a thing as "malice in law;" it was always the vaguest possible phrase—merely a name for the "absence of legal excuse" for some act *primâ facie* unlawful. We have therefore abandoned this technical and fictitious use of the term. Throughout this book, to use the words of Brett, L. J.,[1] "'Malice' does not mean 'malice in law,' a term in pleading, but actual malice, that which is popularly called malice. . . . Here we are dealing with malice in fact, and malice then means a wrong feeling in a man's mind."

The words "malice" and "malicious" still bear different meanings in connection with different crimes. A prisoner cannot be convicted of murder unless he killed his victim "with malice aforethought express or implied." Malice aforethought is a technical phrase; it means—in most cases of murder at all events—a wicked and preconceived determination to kill some human being.[2] In cases of less serious injury to the person the word malice has a much wider meaning. It is not necessary to prove that the prisoner had any spite or ill-will against the person injured or even that he intended to wound or inflict grievous bodily harm on that particular person. He will be deemed to have acted maliciously if he knew or ought to have known that the act, which he intended to do, would injure any one. "A man acts maliciously when he wilfully does that which he knows will injure another in person or property."[1]

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[1] *Clark* v. *Molyneux* (1877), 3 Q. B. D. at p. 247.

[2] See *post*, pp. 275 *et seq.*

Where a soldier, in striking at a man with a belt, accidentally wounded a woman who was standing beside him, it was held that he was guilty of unlawfully and maliciously wounding her. The facts that he had no intention whatever of striking her and had no reasonable cause to expect that she would be struck were held to be immaterial.[2] If a man fired a shot-gun at another with intent only to frighten him and aimed wide on purpose, still if by any chance that other was struck by any of the shot, this would be an unlawful and malicious wounding.[3] So a stupid practical joke may be malicious in this wider sense of the term.[4]

But under the Malicious Injuries to Property Act, 1861,[5] the word "maliciously" has a much narrower meaning. Whenever a statute creates a new offence unknown to the common law, it is always construed strictly. The object of this Act is to prevent injury to property, and the meaning of the word "maliciously" is therefore here restricted to a malicious desire to injure property. An intention to injure a person will not support an indictment under section 51.[6] Nor will it be sufficient to show that the accused intended to do an unlawful act, and that in attempting to do it he has in fact injured property.

If A. flings a stone at B., misses B., but hits and breaks a street lamp, he cannot be found guilty of any offence under the Malicious Injuries to Property Act, 1861,[5] because he intended to wound a man and has only damaged the lamp by accident.[7] If, however, he flings a stone at the lamp meaning to break it, misses the lamp and smashes a plate-glass window instead, then he can be convicted under the appropriate section, for he intended to injure property, though not the particular piece of property which he has in fact injured.

In cases where malice is an essential element of the crime, its existence must be proved affirmatively by the prosecution. In such cases (though in no others) it will be a defence to show that the prisoner acted rashly and heedlessly with no deliberate intent; for, although carelessness may amount to *mens rea*, it cannot be malicious. Malice cannot be implied from the mere circumstance that a man paid no heed to obvious facts. It can be implied from the circumstance that he wilfully shut his eyes to obvious facts on purpose not to see them, for that shows that he knew that they existed.

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[1] *Per* Blackburn, J., in *R.* v. *Ward* (1872), L. R. 1 C. C. R. at p. 360.
[2] *R.* v. *Latimer* (1886), 17 Q. B. D. 359.
[3] *R.* v. *Ward* (1872), L. R. 1 C. C. R. 356.
[4] *R.* v. *Martin* (1881), 8 Q. B. D. 54.
[5] 24 & 25 Vict. c. 97.
[6] See *post,* pp. 402, 403.
[7] *R.* v. *Pembliton* (1874), L. R. 2 C. C. R. 119 ; and see *R.* v. *Child* (1871), L. R. 1 C. C. R. 307 ; *R.* v. *Faulkner* (1877), 13 Cox, 550.

(5) *Cases in which there is no Guilty Mind.*

We have assumed hitherto that the person accused of any crime was of full age, sane and sober, and under no compulsion, delusion or mistake of fact, when he committed the criminal act. The law also presumes this to be the case until the contrary is shown. The *onus* lies on the accused to show the contrary; if he can do so he may escape criminal responsibility, for his act will not make him guilty unless his mind was guilty too.

The alleged criminal, then, must have a mind capable of forming an intention, and capable also of understanding the nature of the act which he contemplates, otherwise he cannot have a guilty mind. He must know right from wrong. In other words, he must possess both will and judgment, and be free to exercise both. He is not criminally liable if he really cannot help doing what he does.

Hence no man can commit a crime when he is asleep or has been thoroughly drugged; for in such a state he is incapable of forming an intention or of understanding the nature of any act which he may do. But if a man chooses to drink to excess and then commits a crime, his drunkenness will afford him no defence; for it was his own voluntary act which reduced him to that condition. If, however, he be charged with doing an act which is only criminal when done with a special intent (*e.g.*, murder, in which it is necessary to prove malice aforethought), and he was so drunk that his mind was incapable of forming that or any other intent, this will be a defence to such a charge.[1] So actual delirium will be a defence, although it is the result of voluntary drinking.[2]

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[1] See *R.* v. *Meade*, [1909] 1 K. B. 895; *R.* v. *Beard* (1919), 14 Cr. App. Rep. 110, and (H. L) *The Times*, March 6th, 1920.

[2] See *R.* v. *Davis* (1881), 14 Cox, 563.

For the same reason no infant under seven years of age can commit a crime. The law also presumes that an infant above seven but under fourteen years is incapable of committing a crime, for he has not yet acquired sufficient discretion to know right from wrong. This presumption, however, may be rebutted (except in the case of rape and offences involving carnal knowledge) by evidence that the infant knew what he was doing, and understood the wrongful nature of his act.[1]

No lunatic will be punished if he does not know what he is doing, or does not know that what he is doing is wrong. If he knows both what he is doing and that he ought not to do it, he is liable, although his desire to do it may be prompted by some delusion; for his motive is, as a rule, immaterial so far as guilt or innocence is concerned. But he will not be liable where the delusion is of such a kind that, if the facts were as he supposed, his act would be justifiable. Again, as insanity may affect the will as well as the judgment, it is possible that a crime may be committed under the influence of some uncontrollable impulse: this, if proved, would be a defence. But it is very difficult to establish this defence to the satisfaction of the Court.[2] Mere irresistible impulse to do wrong affords no exception, if the intellectual faculties are in such a state that the offender knows he is doing wrong.

Duress or compulsion is a defence to all save the gravest crimes. There are two forms of duress—physical and moral. This distinction can best be explained by two instances. If A. seizes the hand of B., in which there is a knife, and by physical force compels B. to stab C., B. will not be guilty of murder, for he cannot help doing what he does; the stabbing, indeed, is A.'s act and not B.'s. Here the compulsion is physical. But if A. threatens to kill or injure B. unless he stabs C., and B. under such moral compulsion does stab C., he will be guilty of murder; for he could and ought to have refused to stab C., although at the risk of his own life.[1] No one is entitled to kill an innocent and unoffending person in order to save his own life. But in other less serious cases even moral compulsion may afford a defence, if the person accused can show that his act "was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others, whom he was bound to protect, inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided."[2] The dread of future penalties cannot be expected to prevail against the certainty of present suffering.

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[1] See *post*, Book VI., Chap. II., Infants.
[2] See *post*, Book VI., Chap. III., Lunatics.

Compulsion is admitted as an excuse for some of the minor forms of treason. If a man who has joined with traitors and taken part in a rebellion can satisfy the jury that he did so only under compulsion, that the compulsion continued during the whole time that he was with the rebels, that he did no more than he was compelled to do, and that he desisted as soon as the compulsion was removed, he is entitled to be acquitted of the treason.[3] "If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless, to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature and necessity hath made him his own protector."[4]

This passage was cited with approval by the Court in the judgment in a well-known case, in which some shipwrecked sailors, who were adrift in a boat and in peril of immediate death from starvation, killed a boy who was among their number and fed on his body. They were all held guilty of murder.[5]

In some cases the law assumes, with singular blindness to the actual facts of life, that a married woman is incapable of freely exercising her will and judgment in the presence of her husband. Hence, if she commit a crime in the presence of her husband, or even in his company, the law presumes that she acted under his coercion and excuses her from punishment, although there be no evidence of any actual intimidation on his part. Such immunity is not granted to a wife who commits one of the graver felonies, such as treason, murder or manslaughter, in the presence of or under the actual coercion of her husband. It is only admissible in the less serious felonies, such as burglary, larceny, robbery, forgery, felonious assault or sending threatening letters, and in most misdemeanours. And even in these cases special circumstances—as, for instance, that the husband was a cripple and bedridden—may be given in evidence to repel the presumption of coercion. Again, if it be proved that the wife took a leading part in the commission of the crime voluntarily and not by the constraint of her husband, then the mere fact that he was present will not excuse her from punishment. And so a married woman may be convicted for keeping a brothel or a gaming house either with or without her husband being joined as her co-defendant; for in the management of a house the wife takes a leading part. But where the wife commits a crime in the absence of her husband, no presumption of coercion arises, even though she did the act by his express command and under the influence of threats of violence on his part. She will be convicted as a principal and he as an accessory before the fact.[1]

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[1] *R.* v. *Tyler* (1838), 8 C. & P. 616.
[2] Stephen, Dig. Criminal Law, 6th ed., 24; and see *R.* v. *Tyler, suprà.*
[3] *R.* v. *M'Growther* (1746), 18 St. Tr. 394.
[4] 1 Hale, P. C. 51.
[5] *R.* v. *Dudley and Stephens* (1884), 14 Q. B. D. 273, 283.

There can, then, be no criminal intent unless the accused has mental capacity, is a free agent, and knows right from wrong. But even in some cases where these three circumstances concur, he may still have no guilty mind and therefore be innocent of crime. Such a state of things exists where the accused has done a criminal act under an honest and reasonable mistake of fact. The mistake must be of such a kind that, had the facts been as the prisoner honestly believed them to be, his act would have been no crime. But if he would still be liable to criminal proceedings if the facts were as he supposed them to be, his mistake of fact will afford him no defence.

Where a son, believing that his father was cutting the throat of his mother, shot and killed him, it was held that if he had reasonable grounds for believing, and honestly believed, that his act was necessary for the defence of his mother, the homicide was justifiable, although the evidence at the trial showed that the father did not in fact intend to murder his wife.[1]

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[1] See *post,* Book VI., Chap. I., Married Women.

A. is alarmed in the night and sees a man in his house, whom he honestly but erroneously believes to be a burglar, and whom he therefore shoots.[2] A. in this case commits no crime. But if A. supposed the man to be merely a drunken trespasser who had entered his house by mistake, and with that impression in his mind shot at him and killed him, he would be guilty of murder.

So, where hurt or damage is the result of an accident which could not have been foreseen or avoided, no blame attaches to the author of the injury, for he had no guilty mind, *e.g.*, in the case of homicide by misadventure.

Lastly, as a general rule, both the guilty act and the guilty mind must be the act and mind of the accused himself, and not of any servant of his. There must be a personal duty on the accused, and he must personally break or neglect that duty, otherwise no indictment will lie against him. "The condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods, knowing them to have been stolen. And this principle of the common law applies also to statutory offences, with this difference, that it is in the power of the Legislature, if it so pleases, to enact, and in some cases it has enacted,[3] that a man may be convicted and punished for an offence although the condition of his mind was not blameworthy; but, inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the Legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the Legislature intended that A. should be punished for the fault of B." [4]

Where a servant or agent does an act which he knows or ought to have known to be criminal, it will be no defence for him to allege that he did it by the command of his master or principal. "For the warrant of no man, not even of the King himself, can excuse the doing of an illegal act."[1] He may be excused, however, if the act was one not in itself criminal or obviously wrongful, but rendered criminal only by facts and circumstances unknown to the servant or agent.[2]

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[1] *R.* v. *Rose* (1884), 15 Cox, 540.

[2] See *R.* v. *Annie Dennis* (1905), 69 J. P. 256.

[3] See *ante*, pp. 118, 119.

[4] *Per* Cave, J., in *Chisholm* v. *Doulton* (1889), 22 Q. B. D. at p. 741.

A master, as a general rule, is not criminally responsible for any act done by his servants without his knowledge or consent. But there are cases in which he owes it as a duty to the public to know what is taking place on his premises, and actively to prevent his servants from doing anything which will cause any public inconvenience.[3]

Thus, if a man's works adjoin a public highway, it is his duty to see that nothing escapes from his premises which will be a nuisance to the public using the highway. It will be no defence for the master to urge that he was not aware of the existence or even of the possibility of any such nuisance, or that he had expressly forbidden his servants to do the acts which created the nuisance. It was his duty to the public to prevent the nuisance, and this duty he has neglected to perform.[4]

Again, a licensed victualler owes it as a duty to the public to know what is taking place on the licensed premises and to manage and control those servants whom he temporarily leaves in charge of them. If, therefore, in his absence one of his servants supplies drink to a man who is already drunk, the master is as liable as if he had done it with his own hand.[5] So a master is liable under the Merchandise Marks Act, 1887,[6] if, contrary to his express commands, one of his servants sells goods to which a false trade description has been affixed, unless the master can show that he has acted in good faith and has done all that was reasonably possible for him to do to prevent the commission of offences by his servants.[7]

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[1] *Per cur.* in *Sands* v. *Child and others* (1693), 3 Lev. at p. 352.

[2] *R.* v. *James* (1837), 8 C. & P. 131.

[3] As to the liability of the proprietor of a newspaper for libels published by his staff, see s. 7 of Lord Campbell's Libel Act (6 & 7 Vict. c. 96).

[4] *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702.

[5] *Mullins* v. *Collins* (1874), L. R. 9 Q. B. 292; *Cundy* v. *Le Cocq* (1884), 13 Q. B. D. 207; but see *Emary* v. *Nolloth*, [1903] 2 K. B. 264; *ante*, pp. 118, 119.

[6] 50 & 51 Vict. c. 28, s. 2.

[7] *Coppen* v. *Moore*, [1898] 2 Q. B. 306; and see *Monsell Bros.* v. *L. & N. W. Ry. Co.*, [1917] 2 K. B. 836, 843.

Chapter III.

DIFFERENT KINDS OF CRIMES AND CRIMINALS.

The number of crimes known to our law has increased enormously during the last hundred years. These additions have been made from time to time as occasion required, and very little of the former law has been repealed. Our criminal law, too, deals with a great variety of different subjects. No department of public or private life is beyond its ken. Recourse is had to legislation whenever the exigencies of the moment, and the varying interests of the community, demand the creation of a new offence. What is now a crime may formerly have been a mere tort, and possibly ere long may be a tort again. "It is a good rule in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law, and to trust as much as can be to the operation of the civil law for the prevention and remedy of wrongs."[1] But this is not the policy at present pursued by the State. The result is that our criminal law is devoid of any scientific arrangement. It is impossible to classify it in any orderly or systematic method.

To a layman's mind, no doubt, the most striking difference between crimes would be afforded by the different modes of trial. The graver crimes are tried by a jury, which determines all questions of fact subject to directions on points of law from a judge, chairman or recorder; they are tried on an indictment at either Assizes or Quarter Sessions. The less serious offences are dealt with by magistrates, or by justices of the peace most of whom have had no legal training; they dispose of them summarily, *i.e.*, then and there without a jury.

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[1] *Per* Bramwell, B., in *R.* v. *Middleton* (1873), L. R. 2 C. C. R. at p. 54.

We will, therefore, in the first instance divide crimes into two classes:—

(i.) Indictable offences.
(ii.) Non-indictable offences.

Many indictable offences may now be either tried by a jury on an indictment or, at the option of the prisoner and with the consent of the magistrate, be disposed of summarily.

The details of these two methods of procedure will be found discussed in Book V. under the head of Adjective Law. It is sufficient to state here that an indictment is a written document which charges the person named in it with the commission of a definite crime; it is prepared with the object of its being "presented" to the Court in which it is proposed to try that person for that crime. But no one can now be called upon to enter the dock and plead to an indictment, unless either he has been committed by justices of the peace to take his trial in that Court, or the consent or direction in writing of a judge of the High Court or of the Attorney-General or Solicitor-General to the presentment of the indictment has been given.[1] If either course has been taken, the prisoner is arraigned and, if he pleads "Not guilty," is tried by a jury. Only the jury can find an accused person guilty on the trial of an indictment. When the offence is triable summarily, no indictment is prepared and the accused is either convicted or discharged by the magistrates themselves.

Indictable offences are of three kinds:—

(i.) Treasons.
(ii.) Felonies.
(iii.) Misdemeanours.

Treason is a specific offence defined by four statutes.[2] It consists in levying war against the King, helping his enemies, compassing his death or imprisonment, &c. For treason the punishment is death. By the statute 11 Vict. c. 12, many treasons were declared to be also felonies; and for such "treason-felonies" the maximum penalty is penal servitude for life.

No logical definition is possible of either a felony or a misdemeanour. The word "felony" was originally used to describe those offences which were punishable at common law by the total forfeiture of the felon's lands, or goods, or both. But a great many other offences have been declared by statute to be felonies; and a conviction for felony no longer involves any forfeiture of the prisoner's property.[1] Hence the distinction between a felony and a misdemeanour is now perfectly arbitrary, and should be abolished. In the present state of our law we can only define a misdemeanour by saying that every indictable offence which is neither treason nor felony is a misdemeanour. The word "misdemeanour" thus includes "a misprision." A misprision may be described as a negative misdemeanour, a mere passive omission of one's duty, as distinct from active misbehaviour; *e.g.*, not assisting the King with advice or warlike service: not turning out when the sheriff calls on the *posse comitatus* for aid.[2]

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[1] Grand Juries (Suspension) Act, 1917 (7 Geo. V. c. 4), s. 1 (2).

[2] 25 Edw. III. c. 2; 1 Anne, st. 2, c. 21; 6 Anne, c. 41; 36 Geo. III. c. 7.

PRINCIPALS AND ACCESSORIES.

Any one who takes part in the actual commission of a crime is a principal. If he actually commits the crime with his own hand, or employs an innocent agent to commit it, he is a principal in the first degree. If he aids and abets the commission of a crime by another, he is a principal in the second degree. A principal in the second degree is regarded as equally guilty, and is liable to the same punishment, as a principal in the first degree; for it is a general rule that whenever two or more persons act in concert with a common purpose which is criminal, each is liable for every act done by any of the others in furtherance of that common purpose.[3]

It makes no difference in the criminal quality of the act done whether the offender did it directly with his own hand, or indirectly by means of some innocent agent; in each case the prime mover is criminally responsible.

Thus, where a cook poisoned her master's dinner and sent it to him in the hay-fields by his little daughter, who was only six years of age, and the master ate it and died, the cook was held to be a principal in the first degree. If a husband at the request of his wife were to deliver a blackmailing letter written by her, being himself unconscious of its contents, his wife would be just as liable as if she had delivered it with her own hand. If a man employs a conscious or unconscious agent to commit an offence in this country, he may be amenable to the laws of England, although he was at the time living out of the jurisdiction of our Courts.

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[1] The Abolition of Forfeitures Act, 1870 (33 & 34 Vict. c. 23), s. 1.

[2] As to misprision of treason, see *post*, p. 151; as to misprision of felony, see *post*, p. 208. It is no crime to misprise a misdemeanour.

[3] See *R.* v. *Swindall and Osborne* (1846), 2 C. & K. 230, *post*, p. 272; and *R.* v. *Salmon and others* (1880), 6 Q. B. D. 79, *post*, p. 296.

As a rule, a principal in the second degree is present at or near the place where the crime is being committed, aiding and abetting in its commission. Accessories are never present at the actual commission of the crime. Any one who incites, counsels, procures or commands another to commit a felony is an accessory before the fact to that felony, if it be committed, and is guilty of felony and punishable in all respects as the principal felon. If A. instigates B. to commit a crime, and B. commits a different and independent crime, A. is not liable. But if B. commits the crime suggested in a different way, or if the crime which B. in fact commits is a natural or probable consequence of his attempt to carry out A.'s orders or suggestion, then A. is an accessory before the fact to the crime actually committed. If, however, after instigating B. to commit a crime A. changes his mind and countermands his orders, he is not liable for any crime which B. commits after the countermand has reached him.

A felony must be actually committed, or there cannot be any accessories. But to incite or solicit another to commit any crime is in itself a misdemeanour, whether that other consents or refuses to do what he is asked to do.[1] And if two or more agree together to commit any crime, all are guilty of the misdemeanour of conspiracy, whether the crime be committed or not.

A. incites B. to kill C. by poisoning him. B. kills C. by shooting him. A. is an accessory before the fact to the murder of C.

A. incites B. to kill C. B. by mistake kills D. A. is not responsible for the death of D. unless he in some way conduced to the mistake.

A. incites B. to kill C., a person unknown to B. A. describes C. to B. and tells him where he will probably find C. at a certain hour. B. goes to that place at that hour and kills D., who answers to the description which A. gave of C. A. is an accessory before the fact to the death of D.

A. incites B. to rob C., whom A. knows to be a strong and courageous man. B. attacks C., and a desperate struggle ensues, in which B. eventually kills C. A. is accessory before the fact to the murder of C., if the jury are satisfied that the struggle and the fatal blow were natural consequences, which A. should have anticipated, of the attempt to rob C.

A. incited B. to kill his (B.'s) wife, and advised him to do so by means of a poisoned apple. B. gave his wife a poisoned apple; she gave it in

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[1] *R.* v. *Higgins* (1801), 2 East, 5; *R.* v. *Philipps* (1805), 6 East, 464.

B.'s presence to their child, who ate it and died. A. is not accessory before the fact to the murder of the child.[1]

The same rule applies to principals acting in concert. Thus, where A. and B. went out to commit theft, and A., unknown to B., took a pistol in his pocket and shot a man with it, B. is not responsible for this murder.

Three soldiers went out to rob an orchard together. Two of them climbed up into an apple tree, whilst the third kept watch with a drawn sword, and killed the owner of the orchard, when he tried to arrest him. The soldiers in the tree are neither principals nor accessories to the murder of the owner, unless all three came with a common determination to overcome all opposition by force.[2]

Any one who unlawfully receives, relieves, comforts, assists, harbours or maintains a felon, knowing that he is a felon, is an accessory after the fact to the felony that he committed.[3] He or she is guilty of felony and liable to two years' imprisonment, with or without hard labour. There is an exception in the case of a married woman: a wife may lawfully receive, comfort and assist her husband, although she knows he is a felon. An accessory after the fact to murder may be sentenced to penal servitude for life.[4]

It is only in cases of felony that there are accessories. In treason all who are in any way concerned in the treason are deemed principal traitors. In misdemeanours all who command, counsel or procure the commission of a misdemeanour are also principals, and should be indicted as such. But it is no crime merely to receive, relieve, assist, harbour or maintain a misdemeanant, knowing him to have committed a misdemeanour;[5] though any attempt at prison breach or rescue or any obstruction to an officer in the execution of his duty would be a misdemeanour in itself.[6]

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[1] *R.* v. *Saunders and Archer* (1573), Plowd. 473; Foster's Crown Cases, 371.

[2] *Plummer's Case* (1701), Foster, 352; Kelyng, 109.

[3] *R.* v. *Levy*, [1912] 1 K. B. 158.

[4] See indictment, No. 21, in the Appendix.

[5] *R.* v. *Bubb* (1906), 70 J. P. 143.

[6] See *post*, pp. 204, 205.

CHAPTER IV.

THE OBJECT AND EXTENT OF CRIMINAL JURISDICTION.

THE object of criminal proceedings is to punish the offender and to prevent any repetition of the offence; the object of a civil action of tort, on the other hand, is to compensate the person injured by giving him damages. It follows that criminal proceedings should never be brought in order to put money into the pocket of the prosecutor, or to gratify any spite which he may feel against the accused. Such proceedings should only be taken in the honest desire to bring an offender to justice in the interest of the community at large.

The State declares to be criminal every wrongful act, the repression of which is necessary for the safety of the public, by whomsoever it may be committed. Every person within the realm, whether natural or artificial,[1] is under the jurisdiction of our criminal Courts. Thus, a corporation or trading company is liable to certain criminal proceedings. There are some crimes, of course, of which a corporation physically cannot be guilty, such as murder or highway robbery. But it can be indicted and fined for publishing a libel; it can be guilty of an offence against the Pharmaceutical Acts,[2] and generally of any offence which can be committed by an agent.[3]

Again, if an alien commits a crime in this country, he can be tried, convicted and punished for it here; it does not matter what his nationality or domicil may be, or what the object of his visit to this country; so long as he is resident within the jurisdiction of our Courts, for however short a period, he owes our King local allegiance: he is within the protection of our laws and must therefore obey them.

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[1] See *ante*, pp. 4, 5.

[2] *Pharmaceutical Society* v. *London and Provincial Supply Association* (1880), 5 App. Cas. 857.

[3] See further Book VI., Chap. VI.

To this general rule there are two exceptions:—

(i.) An alien enemy, who enters the country as one of an invading army, cannot be treated as a criminal in respect of any act of legitimate warfare.

(ii.) A foreign ambassador, his suite and servants are outside the jurisdiction of our ordinary criminal Courts in respect of most, if not of all, crimes.

While aliens have thus always been subject to our laws so long as they stay within the realm, our Courts had at common law no power to take cognizance of any offences committed abroad. These did not affect the safety or tranquillity of this realm, and were therefore left by the comity of nations to be dealt with by the Courts of the country in which each such offence was committed. "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever."[1] This was so whether the offender was a British subject or an alien. Now, however, by various statutes certain crimes committed abroad by a British subject can be tried here, if the offender returns within jurisdiction.

First, as to crimes committed on land: no foreigner is punishable in England for a crime committed abroad, unless indeed he is or was within three months from the date of the crime employed as a master seaman or apprentice on a British ship.[2] A British subject, however, can be tried here for treason,[3] murder and manslaughter,[4] bigamy,[5] certain offences against the Foreign Enlistment Act, 1870,[6] the Official Secrets Act, 1911,[7] and other minor statutes,[8] and any offence punishable as perjury or subornation of perjury,[9] although such offences were committed abroad.

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[1] *Per* Lord Halsbury in *Macleod* v. *Att.-Gen. for New South Wales*, [1891] A. C. at p. 458.

[2] 57 & 58 Vict. c. 60, s. 687.

[3] 35 Hen. VIII. c. 2; 5 & 6 Edw. VI. c. 11, s. 4.

[4] 24 & 25 Vict. c. 100, s. 9.

[5] *Ib.*, s. 57.

[6] 33 & 34 Vict. c. 90, *post*, p. 171.

[7] 1 & 2 Geo. V. c. 28, s. 10; *post*, pp. 152, 153.

[8] See, for instance, 45 Geo. III. c. 85, s. 1; 52 Geo. III. c. 104, s. 7; 52 Vict. c. 10, s. 9.

[9] Perjury Act, 1911 (1 & 2 Geo. V. c. 6), s. 8.

Under the Larceny Act, 1916,[1] a person can be convicted in England of receiving, or having in his possession, in England without lawful excuse goods which were stolen abroad or obtained abroad in any manner which would be indictable in England. If a thief who has stolen goods abroad brings them into this country, he can be indicted under this section for having them in his possession here, knowing them to have been stolen by himself abroad. But a person cannot be convicted in England of conspiring with a person or persons abroad to commit an offence abroad, whether the act is punishable by English law or not. A conspiracy in England to commit a murder abroad has, however, been made punishable here.[2] But a conspiracy abroad to commit murder or any other crime here is not triable in this country.

Next, as to offences committed at sea. A man-of-war is regarded as a floating portion of the land of the State to which it belongs. Hence any one, whether a British subject or an alien, who commits a crime on a British man-of-war, can be tried for it in this country just as if he had committed it in England. On the other hand, no one who commits a crime on a foreign man-of-war can be tried for it here. As to any ship or vessel other than a man-of-war, the case is somewhat different. Any person, whether a British subject or an alien, can be tried here for a crime committed on a British ship at sea — that is, anywhere on the high seas or in rivers below bridges where the tide ebbs and flows and great ships go.[3] But a British subject can also be tried here for a crime committed "on board any foreign ship to which he does not belong."[4] An alien can be tried in this country for piracy on the high seas, whether it was committed on a British ship or not; he can also be tried here for any crime committed on a foreign ship, but only if it was committed whilst that ship was in the territorial waters of Great Britain.[5]

Punishment.

The object of criminal proceedings is, as we have already stated, to prevent any repetition of the crime, whether by the prisoner or by any one else. Thus the State has a twofold purpose when it punishes a criminal:—

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[1] 6 & 7 Geo. V. c. 50, s. 33 (4).

[2] 24 & 25 Vict. c. 100, s. 4.

[3] See *R.* v. *Sattler* (1858), Dearsl. & B. 525; *R.* v. *Anderson* (1868), L. R. 1 C. C. R. 161.

[4] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 686.

[5] Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), passed in consequence of the decision of the C. C. R. in *R.* v. *Keyn* (1876), 2 Ex. D. 63; and see *R.* v. *Lewis* (1857), 26 L. J. M. C. 104; *R.* v. *Bjornsen* (1865), L. & C. 545.

(i.) To prevent that particular criminal from repeating the offence.

(ii.) To deter others from following his pernicious example.

The best way of preventing the particular criminal from continuing his career of crime is to reform him. Punishment therefore should be reformatory as well as deterrent. Some lawgivers have ignored all attempts to reform the offender, and have imposed the severest penalties on all convicted criminals, in order to make the punishment as deterrent as possible to others. But this is a mistake. When the law is too severe, it excites popular sympathy in favour of the criminal. Persons injured will not prosecute; witnesses will not give evidence; juries will not convict; and technical flaws in the proceedings are welcomed even by the judges as affording the accused a chance of escape.[1]

In the case of civilians,[2] there are now only four crimes in England punishable with death:—

Treason.
Murder.
Piracy with violence.
Setting fire to the King's ships, dockyards, arsenals or stores.

In all other cases the punishment may consist of—

Penal servitude (which cannot be for less than three years);

Imprisonment, with or without hard labour (which cannot as a rule be for more than two years); or

Fine.

Penal servitude and hard labour can only be imposed where authorised by some statute.

A prisoner who has been previously convicted may sometimes also be placed under police supervision after the expiration of his sentence.[3] If convicted of an indictable offence he may be ordered to pay the costs of the trial.[1]

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[1] See "A Century of Law Reform," pp. 5, 6, 43—50.

[2] As to soldiers and sailors guilty of mutiny or desertion, see *post*, p. 156

[3] As to preventive detention, see the Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 10.

Whipping is now only allowed in certain special cases (male garrotters, male incorrigible rogues, male offenders against section 2 of the Criminal Law Amendment Act, 1885, male procurers and men who live upon the proceeds of prostitution,[2] &c.). No person can be sentenced to be whipped more than once for the same offence,[3] but juvenile offenders may in some cases be sentenced to receive not more than twelve strokes with a birch-rod. Since 1820 no female can be either whipped or flogged. First offenders are always treated with special leniency.[4] Children between twelve and sixteen years of age may be sent to a reformatory school instead of to prison; children under twelve may be sent to a certified industrial school.

Many other kinds of punishment were known to our ancestors.[5] Transportation existed until 1857, when it was supplanted by penal servitude. Another barbarous form of punishment was the pillory, which, although forbidden in some cases in 1815, was not finally abolished till the year 1830. Again, the use of the ducking-stool was a form of punishment generally inflicted on a common scold, who was wheeled round the town in a chair and then ducked in some pond or other water. The latest recorded instance occurred at Leominster in 1809. Lastly, the stocks was a quaint method of punishment, which although quite obsolete is not yet entirely removed from our statute book. A man was placed in the stocks as recently as 1872.

Any person convicted on indictment may appeal to the Court of Criminal Appeal on any matter of law and, by leave, on any matter of fact and also to obtain reduction of his sentence. "Any person aggrieved by any conviction of a Court of summary jurisdiction who did not plead guilty or admit the truth of the information may appeal from the conviction to a Court of Quarter Sessions"[6] on any question of law or fact, and also to the King's Bench Division on any question of law. The King also has power to pardon any convicted criminal;[1] but even the King cannot pardon an offender—

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[1] Costs in Criminal Cases Act, 1908 (8 Edw. VII.; c. 15), s. 6.

[2] See 2 & 3 Geo. V. c. 20, ss. 3, 7 (5).

[3] Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 36 (1).

[4] See the Probation of Offenders Act, 1907 (7 Edw. VII. c. 17); *post*, Book V.

[5] See Andrews' Old-Time Punishments.

[6] Criminal Justice Administration Act, 1914, s. 37 (1).

(i.) who has been convicted of a public nuisance which still remains unabated; or

(ii.) who has sent a prisoner out of the realm in order to deprive him of the protection of the Habeas Corpus Act.[2]

So far we have dealt with the principles which are applicable to crimes in general. In the remainder of this Book we shall discuss specific crimes in detail and contrast each with those which it most closely resembles.

All crimes, as we have seen, are offences against the State. Even those crimes, which are attacks upon the person or property of an individual, are also injurious to the public at large. There are other crimes which are aimed more directly against the Constitution and tranquillity of the realm, and are therefore more pernicious. For this purpose it has been found convenient to classify crimes into three main groups:—

I. Offences against the Sovereign, the Constitution and the Good Order of the Realm, such as treason, sedition, riot, nuisance and conspiracy.

II. Offences against the Person, such as murder, manslaughter, rape and robbery.

III. Offences against Property, such as larceny, forgery, burglary and arson.

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[1] This prerogative is in no way affected by the Criminal Appeal Act, 1907 (7 Edw. VII. c. 23). See ss. 6, 19.

[2] 31 Car. II. c. 2.

BOOK II.—PART II.

OFFENCES AGAINST THE SOVEREIGN, THE CONSTITUTION AND THE GOOD ORDER OF THE REALM.

Chapter I.

TREASON.

Treason is now a purely statutory offence. It is defined by four statutes :—

25 Edw. III., st. 5, c. 2;
1 Anne, st. 2, c. 21;
6 Anne, c. 41; and
36 Geo. III. c. 7.

These statutes have entirely superseded the common law on the subject. Any act of disloyalty or any attack on the Constitution, which does not fall within the terms of one or other of these four Acts of Parliament as construed by our judges, is not treason,[1] though, as we shall shortly see, it may be punishable as sedition or riot.

The crime of treason cannot be tried at Quarter Sessions. It is punishable with death, which is generally inflicted by hanging—though the Crown may by sign manual direct that the traitor be beheaded.

No person can be guilty of the crime of treason, unless he owes allegiance to the King. Allegiance to the King is due from every person born within the King's dominions, and also from every person born abroad of parents who are British subjects. It is also due from an alien who has become a naturalized British subject. An alien, who has not become naturalized, owes a local allegiance while he is within the British dominions; and if, during such time, he commits an offence which in the case of a natural-born subject would amount to treason, he may be punished as a traitor.[1] For his person and property are as much under the protection of the law as those of a natural-born subject, and if he be injured in either he has a remedy in our Courts for such injury.

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[1] The name High Treason was given to this offence in order to distinguish it from the crime of Petit Treason, which involved a breach of faith due from an inferior to a superior other than the King, *e.g.*, where a servant killed his master, or a wife killed her husband, or an ecclesiastic killed his bishop. The crime of Petit Treason was abolished by 9 Geo. IV. c. 31, s. 2, and 24 & 25 Vict. c. 100, s. 8.

A British subject of full age and not under disability may now, either by obtaining a certificate of naturalization or by making a declaration of alienage, divest himself of his nationality.[2] But he cannot do this in time of war with the view of becoming a subject of the State with which our country is at war; should he subsequently join the military forces of that State he would be guilty of treason. Naturalization under such conditions would afford no defence to an indictment for treason.[3]

Protection and allegiance are reciprocal obligations; hence allegiance is due to him who is in the full and actual exercise of sovereign power, and to none other; a King *de facto*, in the full and sole possession of the Crown, is King within the statutes relating to treason, and while he is on the throne, no other person, out of possession but claiming title to the Crown, is King within these Acts whatever his pretensions may be.[4]

1. The Statute of Treasons, 1351,[5] enunciated the following acts as amounting to treason:—

"When a man doth compass or imagine the death of our lord the King, or of our lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King in his realm; or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be proveably attainted of open deed.[1] And if a man slay the chancellor, treasurer or the King's justices of the one bench, or the other, justices in eyre or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." [2]

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[1] *De Jager* v. *Att.-Gen. of Natal*, [1907] A. C. 326.

[2] British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V. c. 17), ss. 13, 14.

[3] *R.* v. *Lynch*, [1903] 1 K. B. 444; 20 Cox, 468.

[4] 11 Hen. VII. c. 1.

[5] 25 Edw. III. s. 5, c. 2.

2. Any person who shall endeavour to deprive or hinder the person next in succession to the Crown for the time being, according to the limitations of the Act of Settlement, 1701, from succeeding to the imperial Crown of this realm, "and the same malitiously, advisedly and directly shall attempt by any overt act or deed," shall be guilty of treason.[3]

3. It is also treason maliciously, advisedly and directly to maintain by writing or printing that any person has a right to the Crown except in accordance with the Act of Settlement, or to maintain that an Act of Parliament cannot bind the Crown, and limit the descent thereof.[4] Publication of such writing or printing does not appear to be necessary in order to complete the offence under this statute.

4. By an Act passed in the year 1795,[5] made perpetual by an Act of 1816,[6] "whosoever shall within the realm or without compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint" of the King, his heirs and successors, "and such compassings, imaginations, inventions, devises, or intentions or any of them shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof upon the oaths of two lawful and credible witnesses," shall be guilty of high treason.

Each clause of the Statute of Treasons requires separate consideration.

1. The first and most heinous act of treason mentioned in it is where a man "doth compass or imagine the death of the King." The word "compass" signifies the "purpose or design of the mind or will, and not,

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[1] The statute was written in Norman French, and the original language of this clause is "& de ceo ꝑvablement soit atteint de ov͛t faite ꝑ gentz de leur condition."

[2] By the above statute some other acts are also declared to be treasonable which have ceased to be so. Thus, it was treason to counterfeit the King's Great Seal or his Privy Seal, or to counterfeit his money. These two offences were reduced to felony by statutes passed in 1832.

[3] 1 Anne, st. 2, c. 21, s. 3.

[4] Succession to the Crown Act, 1707 (6 Anne, c. 41), s. 1.

[5] 36 Geo. III. c. 7; extended to Ireland by 11 Vict. c. 12, s. 2.

[6] 57 Geo. III. c. 6.

as in common speech, the carrying such design to effect."[1] It will be seen at once that this is an exception to the doctrine laid down by Lord Mansfield in *R.* v. *Scofield*,[2]—that a bare intent, however criminal, is not punishable by our law. A substantive offence is here constituted by the mere secret intention of attempting to kill the King. Yet an "overt act,"[3] though not essential to the crime in the abstract, is essential to the proof of it. The prisoner cannot be convicted unless he "be thereof proveably attainted of open deed;" so that the distinction is in practice immaterial. Nevertheless an indictment under this section invariably charges that the prisoner did "traitorously compass and imagine" the death of the Sovereign, and then goes on to allege overt acts as the means employed by the prisoner for executing his traitorous purpose. The compassing the death is considered as the treason, the overt acts as the means employed to effect the intention of the traitor.

The Act, it will be observed, only protects the King in his personal capacity, save when an army is in the field against him. Hence the judges of the seventeenth and eighteenth centuries by a series of violent interpretations of the original words of the section endeavoured to afford the Monarchy and Government a wider protection—interpretations which were totally at variance with the plain and obvious meaning of the statute. Thus, imprisoning the King was held to be a compassing of his death, and so were the acts of inciting foreigners to invade the kingdom and of levying war against the King even in a distant colony. One of these constructive treasons, namely, compassing and imagining any bodily harm tending to kill, maim, imprison, wound or restrain the King, was made treason beyond all doubt by the Act of 1795,[4] and this is still treason. The other two of these constructive treasons by a subsequent statute were made treason-felonies,[5] and are usually indicted as such. Both these statutes, however, left untouched the Act of Edward III., and it is therefore in some cases still open to the Crown to proceed against an offender either for treason or for treason-felony.[6] In such cases he would no doubt as a rule be indicted only on the lesser charge; he can be convicted of this, although the facts amount in law to treason, and if he is either convicted or acquitted on a charge of treason-felony, he cannot afterwards be prosecuted for treason on the same facts.[7]

2. Violating the King's consort, their eldest daughter unmarried, or the wife of their eldest son and heir, is treasonable, even though it takes place by consent; indeed it would seem that, if the consenting party be the King's consort, she is herself a principal traitor.[8]

3. Levying war against the King in his realm is another form of treason. To bring the case within this clause it is not necessary that the offenders be armed, or even that they be in military array. The word "war" has

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[1] 4 Bla. Com., p. 78.

[2] (1784), Cald. S. C., at p. 403.

[3] This term is explained *post*, p. 147.

[4] 36 Geo. III. c. 7.

[5] 11 Vict. c. 12; see *post*, p. 150.

[6] *Ib.* ss. 6, 7.

[7] *R.* v. *Ahlers*, [1915] 1 K. B. 616, 625.

[8] Anne Boleyn and Catherine Howard were condemned as principal traitors and executed as such.

been construed to include any forcible disturbance, caused by a number of persons for a purpose which was not of a private but of a general character —such as an attempt to obtain the repeal of a statute, or to alter the established religion, or to attain the redress of any public grievance. Thus a person who took part in a riot the object of which was to throw down all enclosures, to burn all meeting-houses, to pull down all brothels, or to throw open all prisons, would be guilty of levying war within the meaning of this clause, although he had no intention or design whatever against the State or the person of the Sovereign.[1] And many other acts were also deemed treason which would now be regarded as merely acts of sedition or riot. These constructions are said to be founded upon the doctrine that, by reason of the universality of the design, such acts and conduct amount to what in ancient times was called "an accroachment of royal power," and constitute what Serjeant Hawkins describes as an insolent invasion of the King's prerogative "by attempting to do that by private authority which he by public justice ought to do,"[2] or, in the terms of the indictment against Sir John Gerberge[3] in 1348, "*usurpando sibi infra regnum regis regiam potestatem . . . contra sui ligeantiam.*"

If, however, the object of a rising be to redress some private grievance or to secure some private end in which the public generally has no concern (*e.g.*, to assert title to land in a private individual or to throw down the fences which enclose a particular common), then, though force be used, the act is not, and never was, treasonable, though it may amount to a riot. The Statute of Treasons expressly declares that if "any man ride openly or secretly with men of arms against any other to slay or to rob him, and to take and keep him till he make fine for his deliverance, it is not the mind of the King nor his counsel that in such case it shall be judged treason; but it shall be judged felony or trespass according to the laws of the land of olden time used, and according as the case requireth." The cases here mentioned of assembling to kill, rob or imprison are put by way of example only; all cases which are of the like private nature fall within the same rule.

4. Again, it is treason to adhere to the King's enemies in his realm giving to them aid and comfort in the realm or elsewhere. In this clause "enemies" means enemies in the sense in which the term is used in international law, *i.e.*, public belligerents, and not mere pirates or rebels. A person can be guilty of treason under this section not only by joining the King's enemies, but also by raising troops for them;[4] by treacherously surrendering to them the King's forts, castles or ships of war;[5] or by sending to them money, arms or intelligence, even though such be intercepted before reaching them.[6] It has been laid down, however, that the accused cannot be convicted of this kind of treason, unless the jury are

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[1] *Dammaree's Case* (1710), 15 St. Tr. 521; *R.* v. *Lord George Gordon* (1781), 21 St. Tr. 485; *R.* v. *Frost* (1839), 9 C. & P. 129; *O'Brien* v. *R* (1849), 2 H. L. Cas. 465.

[2] 1 Hawk. P. C., c. 17, s. 25.

[3] 1 Hale's Pleas of the Crown, 80.

[4] *R.* v. *Harding* (1690), 2 Vent. 315.

[5] 3 Co. Inst. 10; 1 Hale, 168.

[6] Foster's Crown Cases, p. 217; *R.* v. *Gregg* (1708), 14 St. Tr. 1371, 1376; *R.* v. *De la Motte* (1781), 21 St. Tr. 687, 808.

satisfied that he intended to adhere to the King's enemies and gave them aid and comfort with that object.[1] A very wide construction has been placed upon the language of this section. It has now been decided in two famous cases[2] that at the time of committing the offence the accused may be either within or without the realm, the King's enemies may be either within or without the realm, and that the aid or comfort may be given either within or without the realm.

5. Slaying the King's chancellor, treasurer, or the King's justices, &c., when "doing their offices," is also treason. It is doubtful whether this clause applies to the puisne judges of the Chancery Division of the High Court of Justice. Let us hope the point will never arise.

Overt Act.

No one can be convicted of any of the above treasons unless he be "thereof proveably attainted of open deed." The alleged overt act must be set out in the indictment,[3] and no evidence will be admitted of any overt act that is not expressly stated therein. The term "overt act" includes "any act, measure, course or means whatever, done, taken, used or assented to for the purpose of effecting a traitorous intention,"[4] or, in other words, "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object."[5]

An offence within one branch of the statute of Edward III. may be an overt act of a different species of treason,[6] *e.g.*, "levying war is an overt act of compassing the death of the King."[7] Moreover an act, not in itself criminal, may constitute an overt act of treason, if it be done as a means toward, or in the course of executing, a preconcerted treasonable plot.

Thus, if conspirators meet and agree together to kill the King, though they do not then decide upon any scheme for carrying out that purpose, this is an overt act of compassing his death. So are all means employed to incite or encourage others to commit the act or join in the attempt. So is embarking on board a vessel in London for the purpose of prosecuting a treasonable project abroad. Again, to provide or procure weapons or ammunition, or any other act of mere preparation, for the killing or deposing of the King is clearly an overt act of treason which is proof of imagining his death. And "to conspire to imprison the King by force, and move towards it by assembling company," is an overt act of compassing the King's death. In the case of Lord Preston, collecting information for the use of the French King in a design against this country was held to be an overt act of treason, although the information so collected never reached the French.[1] In the case of *R.* v. *Lynch*,[2] the acts of applying for letters of naturalization, taking the oath of allegiance, and making the declaration of willingness to take up arms for the South African Republic were all held to be overt acts of treason.

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[1] *R.* v. *Ahlers*, [1915] 1 K. B. 616, 625.

[2] *R.* v. *Lynch*, [1903] 1 K. B. 444 ; *R.* v. *Casement*, [1917] 1 K. B. 98.

[3] See the form of the indictment in the Appendix, No. 29, and *R.* v. *Casement*, [1917] 1 K. B. at p. 99.

[4] See the words used by Alderson, B., in charging the grand jury at the Liverpool Assizes, December 11, 1848, reported in 6 St. Tr. (N. S.) at pp. 1133, 1134.

[5] *Per* Lord Tenterden in *R.* v. *Thistlewood* (1820), 33 St. Tr. at p. 684.

[6] Criminal Law Commissioners, 6th Rep., p. 5.

[7] *Per* Lord Mansfield in *R.* v. *Hensey* (1758), 1 Burr. 642.

Words merely spoken cannot amount to treason, though they may to sedition. "Unless it be by some particular statute, no words will be treason;"[3] and there is no such statute. Expressions of disloyalty, not specifically connected with any treasonable act or design, do not constitute an overt act of treason. But words which directly incite another to commit treason, or which amount to a treasonable conspiracy,[4] will be sufficient for this purpose; and words which accompany an act alleged to be treasonable are admissible in evidence to show the true nature of that act.

Writing treasonable words is, no doubt, a more deliberate act than merely uttering them. But even in this case the bare words are not treason; and if the writings be not published, they do not constitute an overt act of treason. The conscious publication of printed or written treason is, however, a sufficient overt act. Under the 36 Geo. III. c. 7, it is sufficient if the traitorous compassings be declared "by publishing any printing or writing, or by any overt act or deed."

Where C., being beyond sea, said, "I will kill the King of England if I can come at him," and the indictment, after setting forth the above words, charged that C. came into England for the purpose of killing the King, it was held that C. might on proof of the above facts rightly be convicted of treason; for the traitorous intention evinced by his words converted an action innocent in itself into an overt act of treason.[6]

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[1] *Lord Preston's Case* (1691), 12 How. St. Tr. 645, 727.
[2] [1903] 1 K. B. 444.
[3] *Hugh Pine's Case* (1628), Cro. Car. at p. 126.
[4] *Mulcahy* v. *R.* (1868), L. R. 3 H. L. 306.
[5] The contrary was no doubt decided in *R.* v. *Peacham* (1615), Foster's Crown Cases, 199, and Cro. Car. 125, and *R.* v. *Algernon Sidney* (1683), 9 St. Tr. 889, 893, but the latter case was reversed by a private Act of Parliament in 1689, though not expressly on this point. See Stephen, "History of the Criminal Law," ii. 246, 247.
[6] Foster's Crown Cases, pp. 200, 202.

Williams, a barrister of the Middle Temple, wrote two books, "Balaam's Ass" and the "Speculum Regale," in which he predicted that King James I. would die in the year 1621. He was indicted for high treason, convicted and executed.[1]

Owing to the frequency of prosecutions for treason during the reigns of our Tudor and Stuart kings, and also perhaps owing to the severity of the punishment inflicted, statutes were from time to time enacted with the view of securing that persons accused of treason "should be justly and equally tried." Such a person now has the following privileges which other prisoners do not enjoy :—

(i.) No person can be convicted of treason "but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act or one of them to one and the other of them to another overt act of the same treason."[2]

(ii.) Every person charged with treason is entitled to have delivered to him ten days at least before the trial a true copy of the whole indictment against him on payment of a sum not exceeding five shillings, and a list of the witnesses for the prosecution, stating their names, professions and places of abode;[3] also two days before the trial a copy of the panel of the jurors who are to try him.[4]

(iii.) No person shall be tried for treason unless the indictment against him be presented within three years next after the commission of the alleged treason, except where such treason is committed outside England and Wales.[5]

These privileges, however, do not exist where the prisoner is charged with the "assassination or killing of the King, or any direct attempt against his life, or any direct attempt against his person whereby his life may be endangered or his person may suffer bodily harm;" but the person indicted for any such offence shall be tried "in every respect and upon the like evidence" as if he stood charged with murder.[6]

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[1] *R.* v. *Williams* (1620), 2 Rolle, *R.* 88.

[2] 1 Edw. VI. c. 12, re-enacted by 7 & 8 Will. III. c. 3, s. 2.

[3] 7 & 8 Will. III. c. 3, s. 1, as amended by 7 Anne, c. 21, s. 11.

[4] *Ib.*, s. 7.

[5] *Ib.*, s. 5. This statute also for the first time permitted persons charged with treason to be defended by counsel and to call witnesses for the defence.

[6] 39 & 40 Geo. III. c. 93, extended by 5 & 6 Vict. c. 51, s. 1.

There are no accessories in cases of treason. All who are in any way concerned in the treason are deemed principal traitors. All who command, counsel or procure the commission of a treasonable act, and all who receive, relieve, assist, harbour or maintain a traitor, knowing him to have committed treason, are guilty of the full offence and should be indicted as principals. An indictment for any treason or misprision of treason committed "out of this realm of England" will be tried in the King's Bench Division, unless a special commission be appointed.[1]

Treason-Felony, &c.

Certain offences which were formerly regarded as treasonable are now treated as treason-felony only. Treason-felony, like treason, is a purely statutory offence; it was created in 1848 by the statute 11 Vict. c. 12, which imposes a less severe punishment than that inflicted on persons guilty of treason. The main provision of this statute,[2] as amended in 1891 and 1892,[3] runs as follows:—

Whosoever "shall, within the United Kingdom or without, compass, imagine, invent, devise or intend

to deprive or depose the King from the style, honour or royal name of the Imperial crown of the United Kingdom, or of any other of His Majesty's dominions, or

to levy war against the King within any part of the United Kingdom in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament, or

to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of His Majesty's dominions or countries under the obeisance of His Majesty,

and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter or declare by publishing any printing or by any overt act or deed, shall be guilty of felony, and being convicted thereof shall" be liable to penal servitude for life.

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[1] 35 Hen. VIII. c. 2, s. 1.

[2] S. 3.

[3] 54 & 55 Vict. c. 67 and 55 & 56 Vict. c. 19.

A person can be convicted of felony under this Act, although the facts proved at the trial amount in law to treason; and he cannot afterwards be prosecuted for treason on the same facts.[1] This offence is not triable at Quarter Sessions. The special procedure stated above in cases of treason does not apply to cases of treason-felony; nor is there any period of limitation for the latter offence, nor is the evidence of two witnesses required. The procedure is the same as in an ordinary case of felony.

By 5 & 6 Vict. c. 51, s. 2, it is a high misdemeanour to wilfully strike at the Sovereign or to discharge or attempt to discharge firearms near to his person with intent to alarm His Majesty, whether such firearms are loaded or not.[2] This offence is punishable with penal servitude for seven years, or imprisonment, with or without hard labour, for two years, during which the prisoner may be whipped publicly or privately, but not more than once.[3]

Misprision of Treason.

Misprision of treason is a high misdemeanour; it consists in the bare knowledge and concealment of treason, without any degree of assent thereto. Thus, if any one knows of treason and conceals it, though he in no way consents to or approves of it, he is guilty of misprision of treason. The least degree of assent to it would make him a principal traitor. The punishment for misprision of treason is loss of the profits of land for life, forfeiture of all goods, and imprisonment for life. The offence is not triable at Quarter Sessions, and the procedure is in all respects the same as in a prosecution for treason.

Betrayal of Official Secrets.

The Official Secrets Act, 1889,[4] rendered criminal the unauthorised disclosure of State information and any breach of official trust. This Act was repealed by the Official

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[1] 11 Vict. c. 12, s. 7.

[2] See *R.* v. *Oxford* (1840), 9 C. & P. 525.

[3] Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 36.

[4] 52 & 53 Vict. c. 52.

Secrets Act, 1911,[1] which has greatly enlarged the scope of the former Act. It makes it a felony, punishable with seven years' penal servitude, for any person "for any purpose prejudicial to the safety or interests of the State" to approach, or be in the neighbourhood of, or enter, any work of defence, arsenal, dockyard, camp, ship, office or other "prohibited place," or to make any sketch, plan[2] or model, or to obtain or communicate to any other person any sketch, plan, model, article or note, or other document or information, which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy. On a prosecution under this section it is not "necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document or information relating to or used in any prohibited place within the meaning of this Act, or anything in such a place, is made, obtained or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved."[3]

It is a misdemeanour, punishable with imprisonment for two years with or without hard labour or with a fine or with both, for any person who has in his possession or control any sketch, &c., or information "which relates to or is used in a prohibited place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under His Majesty, or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who holds or has held a contract made on behalf of His Majesty, or as a person who is or has been employed under a person who holds or has held such an office or contract"—

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[1] 1 & 2 Geo. V. c. 28.

[2] A very wide interpretation of this term is given in s 3 of the Act.

[3] S. 1.

(a) to communicate the sketch, &c., or information to any person other than a person to whom he is authorised to communicate it, or a person to whom it is in the interest of the State his duty to communicate it, or

(b) to retain the sketch, &c., in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it.

If any person receives any sketch, &c., or information, knowing, or having reasonable ground to believe, at the time when he receives it, that it is communicated to him in contravention of this Act, he shall be guilty of a misdemeanour, unless he proves that the communication to him was contrary to his desire.

Any person, who attempts to commit any offence under this Act, or incites, counsels or attempts to procure another person to commit any such offence, will be guilty of felony or of a misdemeanour according as the full offence is felony or misdemeanour, and on conviction will be liable to the same punishment as if he had committed the full offence. Moreover any one, who knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be about to commit or to have committed an offence under this Act, and any one, who knowingly permits any such persons to assemble in any premises in his occupation or under his control, is guilty of a misdemeanour and liable to imprisonment with or without hard labour for a term not exceeding one year, or to a fine, or to both.

No one can be committed for trial, indicted or tried for any offence under this Act (though he can be arrested and remanded) without the consent of the Attorney-General or Solicitor-General. No offence under this Act can be tried at Quarter Sessions. Any one indicted for a felony under this Act may, if the circumstances warrant such a finding, be found guilty of a misdemeanour under the Act.

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[1] S. 2.

CHAPTER II.

SEDITION.

SEDITION is a crime closely akin to, but falling short of, high treason. It is sedition to attempt by word, deed or writing to bring the Sovereign, his ministers, officers or judges into hatred or contempt, to stir up discontent and disaffection among his subjects, to attempt or to excite others to attempt to subvert the Constitution, or to disturb the peace and order of the realm, or, in the language of the Criminal Libel Act of 1820,[1] to compose, print or publish any words "tending to bring into hatred or contempt the person of His Majesty, his heirs or successors, or the Regent, or the Government and Constitution of the United Kingdom as by law established, or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means."

To do any such act or to publish any such words by speech or writing is a high misdemeanour, for which either an information or an indictment will lie; and the offender may be sentenced to a term of imprisonment of any length,[2] or to a fine of any amount, or both; or in less serious cases he may be required to find sureties for his good behaviour.[3] If two or more agree together to do any such act or to publish any such words, each is guilty of a seditious conspiracy. No act, however, will be seditious unless its evil consequences are felt over a considerable area or afford a bad example to a considerable number of persons. An isolated breach of the peace is not an act of sedition.

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[1] 60 Geo. III. & 1 Geo. IV. c. 8, s. 1.

[2] Such imprisonment, however, must be in the first division (40 & 41 Vict. c. 21, s. 40).

[3] *Ex parte Seymour and Michael Davitt* (1883), 12 L. R. Ir. 46; 15 Cox, 242.

None of the above offences are triable at Quarter Sessions.

It is not necessary for the prosecution to prove expressly that the defendant intended and desired any of the results stated above: it is sufficient that his acts or words tended to produce such a result. The defendant will be presumed to have intended those consequences which would flow naturally from his conduct. It is always a question for the jury whether his acts or words would or would not in fact tend to produce any of these results; if they would, public safety demands their repression.

> "Every man (who is of sufficient understanding to be responsible for his actions) is supposed to be cognisant of the law, as it is the rule by which every subject of the kingdom is to be governed, and therefore it is his business to know it. If, therefore, a man publishes that which the law says is treasonable, seditious or rebellious, the alleging in the indictment or information that the party did it with a libellous or seditious intent is a mere matter of legal inference from the fact of publication, and not the object of proof either on one side or the other." But "where the fact of publication is ambiguous (as where it may be a doubt whether the party pulled the paper out of his pocket by accident or on purpose, or whether he gave one paper instead of another, or any such supposable case) there the maxim holds that *actus non facit reum, nisi mens sit rea.*"[1]

If the defendant's acts or words attack the honour and integrity of our judges, or in any way tend to obstruct the administration of justice, they are not only seditious: they are also a contempt of court, and may be punished summarily as such.[2] Insolent misconduct in defiance of either House of Parliament or scandalous attacks on a member of either House may also be punished as a contempt of the House.[3]

One striking instance of a seditious act is that of inciting soldiers or sailors to desert or to mutiny. Any one who maliciously endeavours to seduce from his allegiance to His Majesty or incites to any act of mutiny any person serving in His Majesty's forces by sea or land is guilty of felony and liable to penal servitude for life or to imprisonment for not more than three years.[1] The Army Act, 1881,[2] which contains provisions of the same kind, also enacts that the deserter or mutineer himself may be tried by court martial, and, if on or under orders for active service at the time of desertion or mutiny, may be sentenced to death. The Naval Discipline Act, 1866,[3] provides for the punishment of sailors who are guilty of mutiny or desertion.

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[1] *Per* Ashurst, J., in *R.* v. *Shipley* (1784), 4 Dougl. at p. 177; and see *McLeod* v. *St. Aubyn*, [1899] A. C. 549.

[2] See *post*, p. 201.

[3] See Odgers on Libel and Slander (5th ed.), p. 524

Another seditious act would be the training of others in the art of warfare without lawful authority. It is a misdemeanour punishable with seven years' penal servitude (a) to be present in an assembly unlawfully convened for the purpose of training or drilling others in the use of arms or in any military exercises, or (b) to train or drill others, or to aid or assist in so doing. It is a misdemeanour punishable with two years' imprisonment and fine for any one to be thus trained or drilled, or to attend such an assembly for that purpose.[4] The prosecution must be commenced within six months after the date of the offence.

Præmunire.

Certain ancient forms of sedition were punished under the writ of *præmunire,* which is now practically obsolete. Such offences, though only misdemeanours, were very severely punished; the offender was liable to imprisonment for life; he forfeited to the Crown all his property, real and personal, and was declared incapable of taking any legal proceedings. These heavy punishments are frequently alluded to as "the pains and penalties of a *præmunire.*" They were inflicted on any one who in this country attempted to place the authority of some foreign potentate (usually the Pope) above that of the King of England. Thus Cardinal Wolsey was indicted and convicted in 1529 of procuring Papal bulls from Rome contrary to the ancient statutes of *præmunire,* which were even then practically obsolete.

The principal offences of *præmunire* still recognised in our criminal law are:—

(i.) By 25 Hen. VIII. c. 20, the refusal of a dean and chapter to elect to a bishopric the clergyman nominated to them by the King.

(ii.) By the Habeas Corpus Act[5] the unlawful sending of any prisoner outside the realm so that he would be beyond the protection of the writ of *habeas corpus*; for there is no power in the High Court or in any judge to order the issue of a writ of *habeas corpus* directed to a person who at the date of the order is out of the jurisdiction.[1]

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[1] 37 Geo. III. c. 70, s. 1; and see 7 Will. IV. & 1 Vict. c. 91, s. 52.

[2] 44 & 45 Vict. c. 58, s. 12. This Act is re-enacted every year.

[3] 29 & 30 Vict. c. 109, ss. 10, 19, as amended by 47 & 48 Vict. c. 39.

[4] 60 Geo. III. & 1 Geo. IV. c. 1, s. 1.

[5] 31 Car. II. c. 2.

(iii.) Solemnising or assisting or being present at a marriage which is contrary to the Royal Marriages Act, 1772.[2]

Seditious Words.

Words which are merely spoken cannot, as we have seen,[3] amount to treason, or treason-felony; but they often induce sedition. It is a misdemeanour to speak or to write and publish any words which tend to bring into hatred or contempt the Sovereign or his ministers, or the Government and Constitution of the realm, or either House of Parliament, or the Courts of justice, or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State, otherwise than by lawful means. This misdemeanour cannot be tried at Quarter Sessions. The defendant will not be allowed to urge as a defence that the words are true;[4] for Lord Campbell's Act does not apply to seditious words.[5]

Thus it is sedition to speak, as well as to write and publish, of the Sovereign any words which deny his title to the Crown, or call his legitimacy in question, or impute that he is insane,[6] or corrupt, or immoral in his private life, or perjured[7]—any words, in short, which would be libellous and actionable *per se*, if printed and published of any other public character; for such words must tend to create disaffection and disorder. But to assert that the King is misled by his ministers, or is wrong in his policy, is no crime.

Again, a publication is not a seditious libel unless it affects the government of this country. Hence, if the words complained of, though published in this country, do not tend to disturb the peace and tranquillity of the United Kingdom, but only of some foreign country, they are not a seditious libel, and are not punishable here as such[8] (although they may possibly be indictable here as a personal libel upon the individual Sovereign attacked[9]).

But where there is no intention to foment disaffection among the people, to obstruct the administration of the law, or to disturb the peace and tranquillity of the realm, the utmost latitude is allowed in the discussion of all public affairs. A fair comment on any matter of public interest is no crime. "The power of free discussion is the right of every subject in this country. In a free country like ours the productions of a political author should not be too hardly dealt with."[1] "The people have a right to discuss any grievances they may have to complain of."[2] "A journalist may canvass and censure the acts of the Government and their policy—and, indeed, it is his duty."[3]

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[1] *R.* v. *Pinckney*, [1904] 2 K. B. 84.

[2] 12 Geo. III. c. 11, s. 3.

[3] *Ante*, p. 148.

[4] *Ex parte William O'Brien* (1883), 12 L. R. Ir. 29.

[5] 6 & 7 Vict. c. 96, s. 6.

[6] *R.* v. *Harvey and Chapman* (1823), 2 B. & C. 257.

[7] *St. John's Case* (1615), Noy, 105.

[8] *R.* v. *Antonelli* (1906), 70 J. P. 4.

See *R.* v. *Peltier* (1803), 28 St. Tr. 617; *R.* v. *Most* (1881), 7 Q. B. D. 244.

In the present day at all events, an attempt to remove from power the ministers in office, or any agitation for the abolition of any tax or the repeal of any Act of Parliament, cannot be seditious if no unlawful means be employed. Any meeting lawfully convened for the discussion of any matter of public interest, or for the *bonâ fide* purpose of reforming our laws by petitioning Parliament, &c., is not seditious. So with our newspapers. Any words which directly tend to create riot and disorder will be punished. But subject to these restrictions, which are necessary for the protection of the public safety, our newspapers are free to publish what they choose on any matter of public interest. The best method of anticipating and thus preventing sedition is to redress all just grievances of the people. Hence those who call attention to such grievances and endeavour by lawful means to remove them are not guilty of sedition; on the contrary, they are assisting the Government in forestalling sedition.[4]

This country is the birthplace of "the Liberty of the Press." At first no doubt the printing press was regarded with apprehension, and deemed a danger to the State. The King endeavoured to restrict the number of presses and to keep them all in safe hands. Then a censor was appointed, and no one might print (or, later, publish) a book without his *Imprimatur*. This censorship continued till 1695, in spite of Milton's noble protest, the *Areopagitica*, which was published on 24th November, 1644. But since 1695 no preliminary licence is necessary: any man may publish what he will; but he must be prepared to take the consequences if a jury decide that what he has published is a libel. In the latter part of the eighteenth century this question was deemed one for the judge rather than the jury in a criminal case; the jury found the fact of publication, and then the judge decided whether the words were libellous or not. But in 1792 Mr. Fox's Act [1] put a stop to this, and restored the earlier criminal law, by which the practice in civil and criminal cases was identical, viz., that the question of libel or no libel was for the jury.[2] Since that date the English Press has been the freest in the world.

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[1] *Per* Lord Kenyon, C. J., in *R.* v. *Reeves* (1796), Peake, Add. C. at p. 86.
[2] *Per* Littledale, J., in *R.* v. *Collins* (1839), 9 C. & P. at p. 461.
[3] *Per* Fitzgerald, J., in *R.* v. *Sullivan and others* (1868), 11 Cox, at p. 54.
[4] See Odgers on Libel and Slander (5th ed.), pp. 518—522.

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[1] 32 Geo. III. c. 60.

[2] See *post*, p. 179.

CHAPTER III.

BREACHES OF THE PEACE.

As soon as the central authority of the Crown was established in England, its first endeavour was to put an end to all breaches of the peace within the realm. Private wars between nobles, duelling between gentlemen and brawls between peasants in pothouses were all gradually suppressed. Such matters were no longer left in the weak hands of the local officers of the county or hundred; the doctrine of "the King's peace" was recognised and understood throughout the land. Every crime was declared to be "against the peace of our Lord the King, his crown and dignity." And down to the year 1916[1] every indictment concluded with these words, although the offence which it charged might be the secret forgery of a cheque or the silent moulding of a leaden half-crown.

Every wounding, stabbing and robbery, every battery and assault, is in itself a breach of the peace. And such matters will be found dealt with in Part III. of this Book, under "Offences against the Person." It is with offences of a more public character that we propose to deal in this chapter.

Unlawful Assembly.

An unlawful assembly is an assembly of three or more persons, who meet together for a common purpose in such a manner that a breach of the peace may reasonably be apprehended from their conduct. There must be either actual violence or fear of violence caused to bystanders of ordinary courage and firmness.[2] If three or more persons with a common purpose meet together under circumstances which produce in the minds of their neighbours a reasonable apprehension of violence, they are guilty of a crime, although they in fact disperse without doing any violence or even without doing anything towards the execution of their common purpose.[1] The original purpose of the meeting—whether legal or illegal—is immaterial; if its result be either the actual commission or the reasonable apprehension of violence, those taking part in the meeting are guilty of an indictable misdemeanour and are liable to fine or imprisonment without hard labour or both. On the other hand, any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called is guilty of an offence punishable summarily.[2]

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[1] Indictments Act, 1915 (5 & 6 Geo. V. c. 90).

[2] *R.* v. *Vincent* (1839), 9 C. & P. 91, 109.

In deciding whether an assembly is unlawful or not, the hour of meeting and the language used at the meeting[3] should be taken into account, and then it should be considered whether, in the opinion of persons of ordinary firmness and courage, there was reasonable ground for fearing a breach of the peace. The place fixed for the meeting may render it illegal, *e.g.*, where a meeting is advertised to take place in Trafalgar Square in defiance of the authorities, or at Westminster in violation of the Acts against tumultuously petitioning Parliament.[4] Again, the manner of holding the meeting may render it an unlawful assembly. Thus, the prosecution may rely upon the manner in which the people marched to the meeting, the inscriptions on the banners which they carried, the cries of the mob at the meeting, on the fact that some persons present were armed and that no women and children were among the crowd; and indeed upon any circumstances which tend to show that the meeting was a menace to the peace of the neighbourhood.

But a procession with banners is not necessarily unlawful, even though it result in a breach of the peace; and where the promoters of a meeting assemble in a peaceable manner with a lawful purpose, and with no intention of carrying out such purpose in any unlawful manner, the fact that they know that their meeting will be opposed, and have good reason to suppose that a breach of the peace will be committed by their opponents, does not make their meeting unlawful. A lawful assembly does not become unlawful because of the disorderly intentions of others.[1]

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[1] *R.* v. *Birt and others* (1831), 5 C. & P. 154.
[2] 8 Edw. VII. c. 66.
[3] *R.* v. *Hunt* (1820), 3 B. & Ald. 566.
[4] 13 Car. II. c. 5; 1 Will. & M. sess. 2, c. 2; and 57 Geo. III. c. 19, s. 23.

A man may do any act which is lawful, although he has been expressly warned that, if he does that act, some one else will act unlawfully towards him. It is no ground for indicting three persons, A., B. and C., who meet for a lawful common purpose, that persons in the neighbourhood do in consequence reasonably apprehend that violence from X., Y. and Z. will ensue. On the other hand, any man acts illegally who by words or conduct directly induces another to commit a breach of the peace.[2]

Meetings which are convened for the *boná fide* purpose of reforming our laws by petitioning Parliament, or by other lawful means, are not seditious; though whenever persons assemble to bring the Constitution into contempt and to excite discontent and disaffection against the King's Government, it is an illegal meeting.[3]

The police authorities of the district may always disperse an unlawful assembly. But for this purpose only slight force may be used, unless there is reason to apprehend immediate violence on the part of the mob. If, however, force be used and any one be injured in consequence, the question to be tried in any subsequent legal proceeding—civil or criminal—is whether the means used for dispersing the assembly were or were not more violent than the occasion warranted.[4]

Rout and Riot at Common Law.

As soon as an unlawful assembly starts from its place of meeting to carry out the purpose which caused it to assemble, it becomes a rout, for it is *en route*. As soon as it begins to carry that purpose into effect with a show of violence and in obvious defiance of the constituted authorities, it becomes a riot. So, if three or more persons do even a lawful act (such as removing a nuisance) in a violent and tumultuous manner to the alarm of the neighbourhood, they are guilty of riot. The punishment for a rout and riot at common law is the same as that for an unlawful assembly, except that by virtue of the Hard Labour Act, 1822,[1] rioters may be sentenced to imprisonment with hard labour.

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[1] *Beatty and others* v. *Gillbanks* (1882), 9 Q. B. D. 308.

[2] See *R.* v. *Justices of Londonderry* (1891), 28 L. R. Ir. 440; and *Wise* v. *Dunning*, [1902] 1 K. B. 167.

[3] *Redford* v. *Birley* (1822), 3 Stark. at p. 103; *R.* v. *Fursey* (1835), 6 C. & P. 81; *R.* v. *Sullivan* (1868), 11 Cox, 44; *R.* v. *Burns and others* (1886), 16 Cox, 355.

[4] *R.* v. *Howell* (1839), 9 C. & P. 437.

"A riot is a disturbance of the peace by three persons at the least, who, with intent to help one another against any person who opposes them in the execution of some enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of the people."[2] It is not necessary to constitute this crime that personal violence should have been committed, or that a house should have been pulled down or a fence demolished, provided some act has been done towards the accomplishment of the common purpose and that by that act reasonable persons have been put in terror. It is sufficient if one person of ordinary firmness and courage be in fact terrified.[3]

In a well-known case it was held "that there are five necessary elements of a riot:—

(i.) number of persons, three at least;

(ii.) common purpose;

(iii.) execution or inception of the common purpose;

(iv.) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose;

(v.) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."[4]

In that case a number of youths were congregated together at nine o'clock at night in a road in a low neighbourhood, shouting and using rough language. In this road was a house with a yard. Some of the youths stood with their backs against the wall of this yard, and others ran against them or against the wall with their hands extended. After they had been doing this for a quarter of an hour, about twelve feet of the wall collapsed. As soon as it fell the caretaker of the house came out, and the youths at once ran away in different directions. Such conduct was held not to constitute a riot; for there was no evidence of any intention on their part to help one another by force, if necessary, against any person who might oppose them in the execution of their common purpose; nor was their conduct such as would be calculated to cause alarm to persons of reasonable courage and firmness.

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[1] 3 Geo. IV., c. 114.

[2] *Per* Charles, J., in *R.* v. *Cunninghame Graham* (1888), 16 Cox, at p. 427.

[3] *R.* v. *Langford* (1842), Car. & M. 602.

[4] *Per cur.* in *Field* v. *Receiver of Metropolitan Police*, [1907] 2 K. B. at p. 860.

So long as the mob abstains from all felonious violence, such as robbery, housebreaking, arson or attempts to murder, only slight force can be used to disperse them; the police and those whom they have called on to assist them may use their staves and fists, but not firearms. But if felonious violence be used by any of the rioters, a greater degree of force may be employed; and should one of them be killed during the suppression of the riot, the homicide will be justifiable, if it was not possible otherwise to suppress the riot.

Thus, where a publican named Green during the Wilkes riots in 1768, with the aid of his maidservant, shot several rioters who attacked his alehouse with felonious intent, it was held that the homicide was justifiable, and both prisoners were acquitted.

The distinction between treason and sedition on the one hand and riots and unlawful assemblies on the other hand should be carefully observed. The injury or grievance complained of and intended to be remedied by those who are parties to a riot, rout or unlawful assembly, must be a private one, or at all events must concern a limited class only; whereas in treason and sedition the purpose of the offenders is necessarily of a general or a public character, such as an intention to demolish all dissenting chapels or to pull down all fences around modern enclosures. An attempt violently to demolish one particular chapel or to pull down one particular fence would be at most a riot.

As an illustration of this rule we may take the Porteous riots. In the year 1736 a smuggler called Wilson was being hanged at Edinburgh. The mob, who were friends of Wilson, pelted the city guard with stones. Thereupon Captain Porteous ordered the guard to open fire on the mob, many of whom were killed. Captain Porteous was afterwards indicted for murder, convicted and sentenced to be hanged. He was subsequently reprieved. As soon as this was known in Edinburgh an angry mob attacked and disarmed the city guard, seized their weapons and marched to the Tolbooth, in which Captain Porteous, though still a prisoner, was dining with his friends. They set fire to the prison door and compelled the gaoler to hand over the keys, seized Captain Porteous, and hanged him on the Grassmarket, the scene of Wilson's execution, and then quietly dispersed. This was not an act of high treason, for there was no intention on the part of the mob to deny the existence of the general prerogative of pardon. What the mob so strongly objected to was its exercise by the Crown in this particular instance. The provost, who had not taken proper steps to suppress the riot, was declared incapable of holding office in future, and Edinburgh was fined £2,000 for the benefit of Porteous' widow.

Statutory Riot.

The accession to the throne of the House of Hanover was not universally popular in England, and riots broke out in many parts of the country. Hence it was found necessary in 1714 to pass a very stringent measure (usually called the Riot Act[1]), in order to put a stop to such rioting and more effectually to punish rioters. It provides that, whenever any twelve or more persons are unlawfully assembled to the disturbance of the peace, it is the duty of the mayor of a town, or of the sheriff, under-sheriff or a justice of the peace of a county, promptly to repair to the scene of the riot, and when there, if he deem it necessary, to command the rioters by proclamation to disperse. If he deem it necessary so to do, he "shall among the said rioters or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made," a proclamation in the following form or words to the like effect:—

> "Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumultuous and riotous assemblies. God save the King."[2]

If, instead of so dispersing, they remain together riotously for an hour after the proclamation has been read, they all become guilty of felony, and can be punished with penal servitude for life.[3] The whole proclamation must be read, and read correctly, unless the attempt to read it is frustrated by violence. Even if the magistrate merely omits to read aloud the words "God save the King" at the end of the proclamation, the rioters who remain for an hour cannot be convicted of the felony of statutory riot, but only of the common law misdemeanour.[1]

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[1] 1 Geo. I. st. 2, c. 5.

[2] This form is set out in s. 2 of the Act.

[3] Until 1837 the punishment was death. See 7 Will. IV. and 1 Vict. c. 91, s. 1.

Further, the Act expressly provides that, if the reading of the proclamation be by force opposed, the persons who so oppose and hinder the reading are also guilty of felony, and liable to the same punishment. And they become felons at once, as soon as they oppose or hinder; there is no need in their case for an hour to elapse. The other rioters present, who know that the reading of the proclamation has been thus forcibly prevented, must disperse within an hour after the unsuccessful attempt to read it was made, otherwise they become felons at the end of the hour precisely as though the proclamation had in fact been read in full. But persons who arrive after the Act has been read, or an attempt made to read it, commit no crime by merely remaining and looking on.

The prosecution for these statutory felonies must be commenced within twelve months after the offence was committed, and neither of them can be tried at Quarter Sessions.

It is an indictable misdemeanour for any person to refuse to take part in suppressing a riot, when called upon to do so by a justice of the peace or by a constable. And the duty of the justice of the peace himself goes further: it is incumbent on him to read the statutory proclamation if the riot be such as to require it, and to take whatever subsequent steps are necessary to disperse the rioters. If he fail to do this, he is guilty of a criminal neglect of duty, unless he can show that he has at least done all that a man of firm and constant mind would have done under the circumstances.[2]

As soon as a common law riot becomes felonious under this statute, either by the lapse of an hour after the reading of the proclamation, or by the mob committing felonious violence to either person or property even before the hour has elapsed, it becomes the duty of the civil authority to put a stop to the riot at whatever cost. For this purpose it may call upon all persons present "of age and ability," whether soldiers or civilians, to assist in dispersing the mob, and the statute expressly provides "that if the persons so unlawfully, riotously and tumultuously assembled, or any of them, shall happen to be killed, maimed or hurt, in the dispersing, seizing or apprehending, or endeavouring to disperse, seize or apprehend them, by reason of their resisting the persons so dispersing, seizing or apprehending, or endeavouring to disperse, seize or apprehend them, then every such justice of the peace, sheriff, under-sheriff, mayor, bailiff, head officer, high or petty constable or other peace officer, and all and singular persons, being aiding and assisting to them, or any of them, shall be free, discharged and indemnified" from and against all legal proceedings, whether civil or criminal, "for or concerning the killing, maiming or hurting of any such person or persons so unlawfully, riotously and tumultuously assembled, that shall happen to be so killed, maimed or hurt as aforesaid."[1]

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[1] *R.* v. *Child* (1830), 4 C. & P. 442; *R.* v. *Woolcock* (1833), 5 C. & P. 516.

[2] *R.* v. *Kennett* (1831), 5 C. & P. 283; *R.* v. *Pinney* (1832), 3 St. Tr. N. S. 11

Delicate questions often arise as to the amount of force which the civil and military authorities may employ to quell different kinds of riot.

So long as the riot remains simply a common law misdemeanour, only slight force can be used to repress it; the police may use their staves, any other citizens may use their fists or sticks, but deadly weapons such as swords, bayonets or firearms may not be employed. But as soon as any of the rioters commence to perpetrate violent acts of felony, such as murder, arson or pillage, even deadly weapons may be used against those who take any part in such felonious violence, though not against the mob as a whole. And such extreme force may be used to stop or prevent felonious violence by any one present, whether a soldier or a civilian, whether an officer of the peace or not.[2] It makes no difference for this purpose whether the proclamation set out in the Riot Act has been read or not, or whether the statutory hour has or has not elapsed since the reading.[1]

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[1] S. 3.

[2] See the charge of Tindal, C. J., to the grand jury in the case of *R.* v. *Pinney* (1832), 5 C. & P. at p. 262, n.

But where there has not yet been any felonious violence, the rioters do not become felons until one hour has elapsed after the proclamation has been read, and they cannot therefore be shot down. If at the end of that period they are still rioting, the magistrate may summon the military to his assistance if there is reason to fear that the civil force present may be overpowered. The military are bound to obey this summons, but they should not be called upon to take action until action is necessary for the protection of life or property. If the mob still refuses to disperse, the magistrate and the commanding officer should consult together as to the means to be employed for dispersing them. It is primarily the duty of the magistrate, if one be present, to decide whether the time has arrived to use deadly weapons; if he decides that it has, it is for him to instruct the officer "to take action," and he generally does so in writing.[2] Without such instructions from the magistrate the officer should not command his men to fire, unless the rioters are actually committing or evidently on the point of committing felonious violence. And even when so instructed the officer has a discretion as to when to give the order to fire, and as to what precise order to give, *e.g.*, whether to fire with blank cartridges in the first instance. He should also warn the people before firing that deadly weapons are about to be used, and used effectively. He must throughout the proceedings exercise a humane discretion, and cease fire the instant it is no longer necessary.[3]

The distinction between the degrees of force which may lawfully be used (*a*) when the mob are merely misdemeanants and (*b*) when they have become felons through disobedience to the provisions of the Riot Act is well pointed out in the report of the Commission on the Featherstone riots which took place in 1893. It is of course only in the latter case that those who attempt to disperse the rioters are entitled to the indemnity given by section 3 of the Act. In the case of the Featherstone riots the hour had not elapsed after the reading of the proclamation in the Riot Act before the mob was fired upon. But some of the rioters had already set on fire part of the colliery buildings, and were therefore guilty of felonious violence.

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[1] *Per* Lord Loughborough in *R.* v. *Lord George Gordon* (1781), 21 St. Tr. at p. 493.

[2] The King's Regulations and Orders for the Army (1914), 963.

[3] *Ib.* 967, 971.

There are certain statutes which deal with injuries to property caused during a riot. If any persons, riotously and tumultuously assembled together to the disturbance of the peace, unlawfully and with force demolish, pull down or destroy any building or machinery, or begin to do so, they are guilty of a felony punishable with penal servitude for life.[1] If any persons, riotously or tumultuously assembled together to the disturbance of the public peace, unlawfully with force injure or damage any building or machinery, they are guilty of a misdemeanour punishable with seven years' penal servitude.[2] The phrase "building or machinery" above includes any church, chapel, house, stable, coachhouse, outhouse, warehouse, office, shop, mill, barn, shed, farm-building, &c., and any machinery fixed or moveable. On an indictment for the felony under section 11 the jury may, if they think fit, convict the prisoner of the misdemeanour under section 12.

Any one whose "house, shop or building" is injured by rioters is entitled to receive compensation out of the county fund under the Riot (Damages) Act, 1886.[3] The Act also applies to the plundering or damaging by rioters of wrecks, machinery of all sorts, churches, &c., schools, hospitals and public buildings.[4]

Other Breaches of the Peace.

An affray is a fighting between two or more persons in a public place, and is a misdemeanour punishable by fine and imprisonment. Mere words, however abusive, cannot amount to an affray. Any person is justified in interposing and in using force for the purpose of parting the combatants, and if one of the combatants were to kill him in resisting the interference he would be guilty of murder. "For the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts."[1]

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[1] 24 & 25 Vict. c. 97, s. 11.

[2] *Ib.* s. 12.

[3] 49 & 50 Vict. c. 38. Prior to this Act such compensation was payable by the Hundred.

[4] *Ib.* ss. 6 and 7.

It is, of course, the special duty of the police to prevent affrays and assaults in public places, to separate the combatants and to prevent others from joining in the affray. But if a constable sees a breach of the peace committed, and finds himself unable to deal with it single-handed, he may call on any bystander to help him; and if the person thus called on refuses his assistance without lawful excuse, he is guilty of a misdemeanour. It is no defence to an indictment for this misdemeanour that the defendant's assistance, even if it had been rendered, would have been of no avail.

And just as the bystander is bound by law to assist the police, so he is also protected by law against any assault committed upon himself at the time of rendering such assistance. Any one who wounds or causes grievous bodily harm in resisting lawful arrest is guilty of a felony and liable to penal servitude for life.[2] Any one who assaults, resists or wilfully obstructs any constable in the due execution of his duty, or any person acting in aid of such constable, is guilty of a misdemeanour and liable to two years' hard labour.[3]

As to disorderly conduct at public meetings, see the Public Meeting Act, 1908.[4]

Forcible Entry or Detainer.

It is a misdemeanour punishable by fine and imprisonment forcibly to take possession of the lands or tenements of another or, having unlawfully taken possession of such lands and tenements, forcibly to keep possession of them.[5] A man may be guilty of the offence of forcible entry, even though he may have a lawful right to enter; for he has his remedy by a peaceable action at law.

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[1] *Per* Parke, B., in *Timothy* v. *Simpson* (1835), 1 Cr. M. & R. 757, 762.

[2] Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 18.

[3] *Ib.* s. 38.

[4] 8 Edw. VII. c. 66.

[5] 5 Rich. II. c. 7; 15 Rich. II. c. 2; 8 Hen. VI. c. 9; and see *R.* v. *Harland* (1838), 8 A. & E. 826; *Lows* v. *Telford* (1876), 1 App. Cas. 414; *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199.

Breaking open the doors or windows of a house is a forcible entry within the meaning of the statute; so also is an entry obtained by or accompanied with threats of personal violence, if such threats were likely to intimidate the prosecutor or his family and to deter them from defending their possession. But an entry gained by means of an open window, or by opening a door with a key, or by some trick, is not a forcible entry. Again, a mere trespass is not a forcible entry, for there must be such force or show of force as is calculated to prevent resistance. What the statute expressly forbids is an entry with "strong hand" or "with multitude of people."

Nevertheless some forcible entries are justifiable. Thus, a sheriff who is lawfully executing the process of the Court may break open the outer door of the house of the judgment debtor in order to seize his goods therein. A landlord, however, who is seeking to levy a distress for rent in arrear, may not break open the outer door of the demised premises.

A police constable, who seeks to arrest a person whom he reasonably believes to have committed felony or for whose arrest he holds a warrant, may, after stating his office and demanding admission, break open the outer door of any house in which he has reason to believe the defendant to be. He has the same right to enter a house to prevent a breach of the peace being committed within.

Offences against the Foreign Enlistment Act, 1870.[1]

The State forbids its subjects to take any active part in wars between foreign countries with which it is at peace; it also endeavours to prevent any hostile preparations being made in this country, whether by British subjects or by aliens, for use in such a war. To permit either might be regarded by the belligerent Power affected as "an unfriendly act," if not as a breach of neutrality.

The principal sections of this Act are directed to enforce neutrality on British subjects, when war has been declared between two foreign Powers friendly to us. But it also contains provisions, which relate to times of peace and forbid any British subject to make an attack upon or incursion into the territory of any friendly Power, whether it is at war with any other State or not.

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[1] 33 & 34 Vict. c. 90.

A person who does any of the following acts without the licence of the Crown is guilty of a misdemeanour :—

(i.) Any British subject who enlists for service under a State which is at war with another State that is itself at peace with Great Britain ;[1]

(ii.) Any one who within the British dominions induces any other person so to enlist ; [1]

(iii.) Any one who within the British dominions equips, builds, despatches or agrees to build, a ship which he has reasonable cause to believe will be employed in the service of a foreign belligerent State ;[2] (the fact that it is so employed throws upon him the burden of proving that he did not know that it was intended for such a purpose ;[3])

(iv.) Any one who within the British dominions fits out any naval or military expedition against any State that is at peace with Great Britain ; [4]

and is liable to fine and imprisonment for two years with or without hard labour ; [5] and all munitions of war connected with the charge will on conviction be forfeited to the Crown

It will be noticed that in case (i.) above the crime can only be committed by a British subject, but it can be committed either within or without the British dominions. In the other three cases the crime can be committed either by a British subject or an alien, but only within the British dominions. Our Government is responsible for any act of this kind which is committed, even by aliens, within the British dominions, for it is prejudicial to a friendly foreign Power.

[1] 33 & 34 Vict. c. 90, s. 4 ; and see ss. 5, 6 and 7.

[2] *Ib.* s. 8.

[3] *Ib.* s. 9.

[4] *Ib.* s. 11.

[5] *Ib.* s. 13.

Thus where a Chilian, resident in Great Britain, purchased guns and ammunition here and sent them to a foreign neutral port to be there placed on board a ship which was to take part in the war between Chili and Peru —both States being friendly with Great Britain—it was held that he had committed an offence under section 11, for he knew that the guns and ammunition were to be used in the war against Peru.[1] Again, where an expedition is fitted out in the British dominions, any British subject who assists in the preparation of the expedition from a place outside the British dominions, or joins it after it has entered the territory of a foreign State that is at peace with Great Britain, is guilty of an offence under section 11.[2]

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[1] *R.* v. *Sandoval* (1887), 16 Cox, 206.

[2] *R.* v. *Jameson,* [1896] 2 Q. B. 425.

CHAPTER IV.

ACTS CALCULATED TO PROVOKE A BREACH OF THE PEACE.

It is a misdemeanour at common law, punishable with fine and imprisonment on indictment (and in some few cases on a criminal information), to write and publish defamatory words of any person, or exhibit any picture or effigy defamatory of him, provided the publication of such words, or the exhibition of such picture or effigy, is calculated to cause a breach of the peace.[1] An attempt to publish such words or to exhibit such picture or effigy may also be a crime. But it is not a crime merely to speak such words, however maliciously.[2] A libel on a thing is no crime: and wherever no action would lie without proof of special damage, no indictment or information can be preferred.

Hence, whenever libellous words are published which tend to provoke a breach of the peace, the person libelled has two remedies. He may either commence a civil action for damages or he may take criminal proceedings. In some few cases also he has two criminal remedies; he can proceed either by way of indictment or by criminal information. The number of criminal informations has, however, been greatly reduced since the decision in the case of *R. pros. Vallombrosa* v. *Labouchere.*[3] This special relief is now only granted to high officers of State, judges and other persons who are discharging public duties imposed upon them by statute.[4] Private persons are left to their ordinary remedies by indictment or action.

These two remedies are distinct and independent, and the person libelled may take either at his option. In theory of law he may take both at once, but in practice he would find it impossible to pursue both remedies to the

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It is a felony to publish blackmailing letters: see *post*, p. 181.

[2] See Lord Campbell's Libel Act, 1843 (6 & 7 Vict. c. 96), ss. 4, 5.

[3] (1884), 12 Q. B. D. 320.

[4] *R.* v. *Russell and another* (1905), 93 L. T. 407.

bitter end. He is not bound to take criminal proceedings; if he is content to sue for damages, no one will blame him. But it is necessary for the repression of libels that there should be a criminal remedy as well. Libellers are often penniless, and a civil action therefore has no terrors for them. The plaintiff will never get his damages. Hence the civil remedy is not by itself a sufficient protection for the public.

The same words if merely spoken would be no ground for any criminal proceedings, though they may give the person slandered a good cause of action. Yet a slander clearly may tend to produce a breach of the peace. The mischief done by libels, however, is so extensive, and the bad example they set is so pernicious, that it is right that they should be repressed for the public good. Slanders do less mischief. They are probably uttered in a moment of anger and haste; they are less permanent and more easily forgotten, and their evil effects are not so widely diffused as a libel published in a newspaper. One never knows into whose hands written or printed matter may come. Hence it is the law of England that a slander on a private individual is a tort and not a crime, while a libel on a private individual is both a tort and a crime, if it tends to provoke a breach of the peace.

Not every libel is a crime, but only those which the State has an interest in repressing. In other words, not every publication which would be held a libel in a civil case can be made the foundation of criminal proceedings. "A criminal prosecution ought not to be instituted unless the offence be such as can be reasonably construed as calculated to disturb the peace of the community. In such a case the public prosecutor has to protect the community in the person of an individual. But private character should be vindicated in an action for libel, and an indictment for libel is only justified when it affects the public, as an attempt to disturb the public peace."[1]

While therefore criminal proceedings for libel will not lie in every case in which a civil action can be brought, so on the other hand the criminal remedy is in some cases more extensive than the civil. There may be many libels, the circulation of which would be a danger to the public peace and tranquillity, and which yet might afford no ground for an action for damages. Thus, it is a misdemeanour to libel any sect, company or class of men, though no particular person is indicated,—provided it be alleged and proved that such a libel tends to excite hatred against all belonging to such sect or class, and conduces to a breach of the peace.

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[1] *Per* Lord Coleridge, L. C. J., in *Wood* v. *Cox* (1888), 4 Times L. R. at p. 654, referring to his own judgment in *R.* v. *Labouchere* (1884), 12 Q. B. D. 320; see especially pp. 322, 323.

Thus in an old case[1] the defendant published a sensational account of a cruel murder said to have been committed by certain Jews lately arrived from Portugal and then living near Broad Street. They were said to have burnt a woman and a new-born baby alive because its father was a Christian. Certain Jews who had recently arrived from Portugal, and who then lived in Broad Street, were in consequence attacked by the mob, barbarously handled, and their lives endangered. Criminal proceedings were at once commenced against the defendant. The objection was raised that it did not appear precisely who were the persons accused of the murder, and that no civil action for damages could therefore have been brought for want of a proper plaintiff. But the Court held that it was wholly immaterial whether a civil action would lie or not, and granted a criminal information; for obviously there would soon have been a riot, if not a massacre, in Broad Street, if such libels had not been promptly suppressed. So in a recent case an indictment charging a person with encouraging persons unknown to murder the sovereigns and rulers of Europe was held good, as a sufficiently well-defined class was referred to by the words "sovereigns of Europe."[2]

Again, criminal proceedings may be taken if the defendant has published defamatory words about a man who is dead, provided the obvious tendency of such words is to provoke his family to a breach of the peace. Such a libel, from the point of view of the State, is just as pernicious as a libel on a living man, who might take the law into his own hands and chastise the offender himself. No civil action can be brought for a libel on a dead man.[3] But an indictment will lie for such words whenever they clearly tend to provoke a breach of the peace. It is not necessary to prove that a breach of the peace was actually committed; still less that the libeller intended or desired that an assault should ensue. It is enough if the natural effect of the words is to dishonour the memory of the deceased and to outrage his posterity to such an extent as to render abreach of the peace imminent or probable.[4]

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[1] *R.* v. *Osborn* (1732), 2 Barnard. 138, 166. And see *R.* v. *Gathercole* (1838), 2 Lewin, C. C. 237; *R.* v. *Russell and another* (1905), 93 L. T. 407.

[2] *R.* v. *Antonelli* (1906), 70 J. P. 4.

[3] *Luckumsey Rowji* v. *Hurbun Nursey and others* (1881), I. L. R. 5 Bombay, 580; *Broom* v. *Ritchie* (1905), 6 F. 942, Ct. of Sess.

[4] *R.* v. *Topham* (1791), 4 T. R. 126; *R.* v. *Walter* (1799), 3 Esp. 21; but see *R.* v. *Ensor* (1887), 3 Times L. R. 366. As to threatening to libel a dead man in order to blackmail his children, see *post*, pp. 181—183.

This distinction between the object of civil and the object of criminal proceedings also explains the difference between the civil and criminal law as to publication. In civil actions for damages the plaintiff must prove a publication to some third person; as, without that, there is no injury done to his reputation, and nothing therefore for which he can claim compensation. But it does not matter to the State whether a plaintiff is entitled to damages or not. If the defendant's act is calculated to lead to a breach of the peace, it must be stopped. And a libel published only to the person whom it defames endangers the peace and good order of society, just as much as one addressed to a third person—indeed, it is probably more dangerous. Hence in criminal proceedings it is sufficient for the prosecutor to prove a publication to himself alone.[1] It is not necessary for him to show that his reputation has been impaired; for he is not claiming any compensation for himself, but only seeking to promote the interests of the public.

For the same reason it is no answer to criminal proceedings for the defendant to prove that his words are literally true; he must go further, and show that it was for the public benefit that such words should be published; otherwise there is no countervailing advantage to compensate the public for the risk of a breach of the peace. Indeed, at common law the defendant was not allowed in any case to prove in a criminal trial that his words were true. The truth of the libel was (and is) a complete answer to a claim for damages; but it was no defence to a prosecution, for it was thought that the very fact that his words were true would render it more probable that a breach of the peace would follow the publication. This is what is meant by the old maxim, "The greater the truth, the greater the libel." That maxim never applied to civil proceedings for damages; if the charge made by the defendant was true, the plaintiff never could recover any damages. But in criminal proceedings, until the year 1843, the fact that the words were true was regarded as wholly irrelevant. No evidence to that effect was admissible; the attempt to give such evidence was regarded as an aggravation of the original offence.

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[1] *R.* v. *Adams* (1888), 22 Q. B. D. 66.

The Legislature, however, in the year 1843 came to the conclusion that in certain circumstances and with certain safeguards the defendant might be allowed to show in his defence the truth of the charges which he had made. By section 6 of Lord Campbell's Libel Act, 1843,[1] a defendant is now permitted to plead that his words are true, provided he also alleges that it was for the public benefit that his words were published, and sets out the facts which made their publication a benefit to the public. If a plea of this kind is pleaded, the defendant will be entitled to give evidence of the truth of his charges against the prosecutor; but such evidence will not amount to a defence to the indictment, unless it was for the public benefit that such charges should be made public. The defendant must prove every one of his charges substantially true; if some of them prove to be false, judgment will go against him, although he may have proved the truth of others; nor will it avail him that he honestly believed them all to be true.[2] Where *primâ facie* evidence is given in proof of the justification, the *onus* will then be on the prosecutor to disprove it, and his not calling witnesses, whom he must be in a position to call and who will be friendly to him, will be strong evidence against him.[3] If, however, the defendant is ultimately convicted, the Court will consider whether his guilt is aggravated or mitigated by his plea of truth, and by the evidence given to prove or disprove the same, and may increase or diminish the amount of the sentence accordingly.

Other instances were discovered in which the criminal law treated individuals who were really innocent with a severity greater than the interests of the public required. Thus it was the rule in both civil and criminal proceedings—and a good and wholesome rule—that a master is liable for all acts of his servant done in the ordinary course of that servant's employment and in pursuance of the master's orders, expressed or implied. This rule pressed very hardly on the proprietor of a newspaper. He was not only liable in damages, but he was also criminally liable, if his editor permitted a libel to appear in the paper, although he himself had never seen it.[1] Hence Lord Campbell inserted in his Libel Act a provision which enables any defendant, whose servants or agents have published a libel without any express instructions from him, to prove that such publication was made without his authority, consent or knowledge, and did not arise from want of due care or caution on his part.[2] Such proof is now an answer to an indictment, although it is still no defence to a claim for damages.[3]

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[1] 6 & 7 Vict. c. 96. See indictment and plea, Nos. 16 and 16a, in the Appendix.
[2] See *R.* v. *Newman* (1853), 1 E. & B. at p. 573.
[3] *R.* v. *Labouchere* (1880), 14 Cox 419.

Libel or no libel is always a question for the jury both in civil and criminal cases. It is for the judge to determine whether the words complained of are capable of a libellous meaning, and also whether they have in law been published; all other questions which ordinarily arise on the trial of an indictment or information for libel must be left to the jury. The judge should explain to them what a libel is; he may state for their guidance what his own opinion is of the document before him; but the ultimate decision of the matter rests with the jury.

So much for the common law misdemeanour of publishing a libel. But certain offences have been created by statute, which deserve attention here.

By section 4 of Lord Campbell's Libel Act, 1843, it is a misdemeanour to maliciously publish any defamatory libel knowing the same to be false; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed two years, without hard labour.

By section 5 of the same Act, it is a misdemeanour to maliciously publish any defamatory libel; the punishment may be fine or imprisonment, or both, such imprisonment not to exceed one year, without hard labour. This section does not create any new offence, or attempt to define any existing offence; it merely fixes the punishment to be awarded for the existing common law misdemeanour of maliciously publishing a libel.[1]

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[1] *R.* v. *Walter* (1799), 3 Esp. 21.

[2] 6 & 7 Vict. c. 96, s. 7.

[3] See *R.* v. *Holbrook* (1877), 3 Q. B. D. 60; (1878), 4 Q. B. D. 42. Here the defendants, proprietors of a newspaper, had appointed an editor with general authority to conduct the paper—they themselves taking no part in the management of it—and the main question was whether the general authority thus given to the editor was *per se* evidence that the defendants had authorised or consented to the publication of a libel contained in it within the meaning of the above section.

By section 1 of the Corrupt and Illegal Practices Prevention Act, 1895,[2] any person who, before or during any parliamentary election, shall, for the purpose of affecting the return of any candidate at such election, make or publish any false statement of fact in relation to the personal character or conduct of such candidate, shall be guilty of an illegal practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883,[3] and shall be liable, on summary conviction, to a fine not exceeding £100, and will be incapable of voting at any election in the same constituency for five years. But by section 2 "no person shall be deemed to be guilty of such illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true." Similar provisions are contained in the Municipal Elections (Corrupt and Illegal Practices) Acts, 1884 and 1911.[4]

By section 8 of the Law of Libel Amendment Act, 1888,[5] no criminal prosecution can be commenced against any proprietor, publisher, editor or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers being first had and obtained. Such application must be made on notice to the person accused, who must have an opportunity of being heard against it. No order will be made under this section where a civil action will meet the requirements of the case, even though the libel be a serious one. No appeal can be brought from the decision of a judge at chambers under this section.[6] But note that this section affords no protection to the writer of the libel, although he may be a regular reporter or article writer on the staff of a newspaper.

There are other publications which are criminal libels. We have already dealt with Seditious Words in Chapter II. The publication of blasphemous and obscene words respectively will be discussed in Chapters VII. and VIII. of this Book.

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[1] *R.* v. *Munslow,* [1895] 1 Q. B. 758.

[2] 58 & 59 Vict. c. 40.

[3] 46 & 47 Vict. c. 51.

[4] 47 & 48 Vict. c. 70: 1 & 2 Geo. V. c. 7.

[5] 51 & 52 Vict. c. 64. And see ss. 4 and 5 of the Newspaper Libel Act, 1881 (44 & 45 Vict. c. 60).

[6] *Ex parte Pulbrook,* [1892] 1 Q. B. 86; and see Odgers, Libel and Slander (5th ed.), pp. 714, 715.

Sending Threatening Letters.

Nothing can be clearer than the fact that the receipt of a threatening letter is likely to lead to a breach of the peace on the part of the recipient. And so the law has provided that the sending of a threatening letter is a crime punishable more or less severely according to the nature of the threat which it contains. For example, if any person knowing the contents send or deliver any letter threatening to burn or destroy any house or other building, or grain or other agricultural produce in a building, or any ship, he is guilty of felony, and liable to be sent to penal servitude for ten years.[1] If the threat be to kill, maim or wound any cattle, the offence of sending the letter containing such threat is punished with equal severity.[1] And the same consequences attach to the sending of a letter threatening to murder.[2] Again, "every person who—

(i.) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces,[3] and without any reasonable or probable cause, any property or valuable thing;

(ii.) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person;

(iii.) with intent to extort or gain any property or valuable thing from any person accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime;

shall be guilty of felony, and on conviction thereof liable to penal servitude for life, and, if a male under the age of sixteen years, to be once privately whipped in addition to any other punishment to which he may by law be liable.

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[1] 24 & 25 Vict. c. 97, s. 50.

[2] 24 & 25 Vict. c. 100, s. 16.

[3] By "menaces" is meant not only threats of injury to the person or property of the prosecutor, but also threats to accuse of misconduct, although such misconduct may not of itself amount to a crime: *R.* v. *Tomlinson*, [1895] 1 Q. B. 706.

Every person who with intent to defraud or injure any other person—

(*a*) by any unlawful violence to or restraint of the person of another, or

(*b*) by accusing or threatening to accuse any person (whether living or dead) of any such crime or of any felony,

compels or induces any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix the name of any person, company, firm or co-partnership, or the seal of any body corporate, company or society upon or to any paper or parchment in order that it may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of felony and on conviction thereof liable to penal servitude for life.

This section applies to any crime punishable with death, or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise or threat offered or made to any person, whereby to move or induce such person to commit or permit the abominable crime of buggery, either with mankind or with any animal. For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury or accusation to be caused or made by the offender or by any other person."[1]

It is immaterial whether the prosecutor be innocent or guilty of the offence imputed to him; the gist of the crime is the attempted extortion.[2]

"Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding five years."[1]

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[1] Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 29. See indictment, No. 28, in the Appendix.

[2] *R.* v. *Gardner* (1824), 1 C. & P. 479.

"Every person, who with intent—

(*a*) to extort any valuable thing from any person, or

(*b*) to induce any person to confer upon or procure for any person any appointment or office of profit or trust,

(1) publishes or threatens to publish any libel upon any other person (whether living or dead), or

(2) directly or indirectly threatens to print or publish or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead),

shall be guilty of a misdemeanour and on conviction thereof liable to imprisonment, with or without hard labour, for any term not exceeding two years."[2]

Other offences against the public peace are constituted by sending a challenge or a threatening letter inviting or inciting others to break the peace, or by making use of threatening, abusive, or insulting language or behaviour which will provoke others to break the peace.[3]

Challenges to Fight.

To challenge a man to fight is a common law misdemeanour punishable with fine and imprisonment, whether such challenge be given by word of mouth or by letter. Any one who knowingly bears a challenge is also guilty of a misdemeanour similarly punishable; and so is any one who intentionally provokes another to challenge him. Provocation, however great, is no excuse or justification,[4] although it may weigh with the Court in awarding the punishment.

In the case of a prize-fight, the occupier of the building or premises in which it is to take place, those hiring the building or premises for the purpose of the fight, the combatants, the seconds and the referee will each and all be held responsible, if any breach of the peace occur, or if any serious injury be done to either of the combatants or to any one present, or if any illegal betting take place.[1]

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[1] Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 30.

[2] *Ib.* s. 31, which takes the place of s. 3 of Lord Campbell's Libel Act, 1843 (6 & 7 Vict. c. 96).

[3] *R.* v. *King* (1880), 14 Cox, 434.

[4] *R.* v. *Rice* (1803), 3 East, 581.

Three Persons Armed in Pursuit of Game by Night.

"If any persons, to the number of three or more together, shall by night unlawfully enter or be on any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits," and be armed with offensive weapons such as firearms, bludgeons, &c., they are each and all guilty of a misdemeanour under the Night Poaching Act, 1828,[2] and are liable to be sent to penal servitude for fourteen years or to be imprisoned for two years with hard labour. The Legislature assumed that, in the event of the poachers being disturbed, they would be unable to resist the temptation of using their offensive weapons against the gamekeepers, thus causing a serious breach of the peace. If one of them is so armed with the knowledge of the rest, they can all be convicted. "Night" is defined as commencing at the expiration of the first hour after sunset and concluding at the beginning of the last hour before sunrise.[3] A prosecution for this crime must be commenced within twelve months after the alleged commission of it.[4]

This offence is not triable at Quarter Sessions.

SURETIES FOR THE PEACE.

In addition to punishing breaches of the peace actually committed, the law wisely provides a method for preventing such disorderly conduct from occurring. A man may have been guilty of some small offence, for which it is not thought advisable to send him to prison, or his conduct and language may show that, although he has not committed any offence, there is good ground for suspecting that he will do so in the near future, unless some measures be taken to restrain him. In both these cases he may be compelled to find pledges or sureties either (a) for keeping the peace, or (b) for his good behaviour.[1] These sureties, as well as the offender himself, will then be ordered to enter into "recognizances," as they are called. A "recognizance" is a contract executed or acknowledged before a Court of record, or any Court or officer authorised to take recognizances, by a person who thereby admits his indebtedness to the Crown in a specified sum, such indebtedness to cease upon his carrying out the order of the Court, *e.g.*, that he be of good behaviour for six months, either generally "towards all the King's subjects" or specially towards the person requiring security. In default of sureties being provided, or if the offender refuses to enter into a recognizance himself, the justices may commit him to prison.[2]

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[1] The police generally warn such persons of their responsibility beforehand.

[2] 9 Geo. IV. c. 69, s. 9.

[3] *Ib.* s. 12.

[4] *Ib.* s. 4.

Such recognizances may be required from a person who has committed a breach of the peace, whether any further punishment be inflicted or not. Again, such recognizances may be required from a person who has not yet committed any offence, provided there is good cause to believe that he intends to commit an offence, or to incite or provoke other persons to commit an offence, or if his acts or words directly tend—even against his will—to induce other persons to commit an offence. It is not necessary that the person whom it is sought to bind over should directly incite to the commission of a breach of the peace; it is sufficient if he uses language, the natural consequence of which is that breaches of the peace will be committed by others. And whenever one man goes in fear of death or bodily harm from another, he may "swear the peace" against him—that is, may require him to find sureties for his peaceable behaviour.

"I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them."[1] "Where it shall be made reasonably to appear to a justice of the peace that a person has incited others by acts or language to a violation of law and of right, and that there is reasonable ground to believe that the delinquent is likely to persevere in that course, such justice has authority by law, in the execution of preventive justice, to provide for the public security by requiring the individual to give securities for good behaviour, and in default commit him to prison."[2] "There must be an act of the defendant the natural consequence of which, if his act be not unlawful in itself, would be to produce an unlawful act by other persons."[3]

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[1] *Lansbury* v. *Riley*, [1914] 3 K. B. 229.
[2] 42 & 43 Vict. c. 49, s. 25.

The facts of the case, from the judgment in which the last extract is taken, were as follows:—

Mr. Wise was a Protestant lecturer who held meetings in public places in Liverpool; he thereby caused large crowds to assemble and obstruct the thoroughfares. In addressing those meetings he used gestures and language which were highly insulting to the religion of the Roman Catholics, of whom there was a large number residing in Liverpool. The natural consequence of his words and conduct on those occasions was to cause, and his words and conduct had in fact caused, breaches of the peace to be committed by his opponents and supporters; nevertheless he threatened and intended to hold similar meetings in the city, and to act and speak in a similar way in the future. At one of the meetings he told his supporters that he had been informed that the Catholics were going to bring sticks, and on some of his supporters saying that they would bring sticks too, he said that he looked to them for protection. A local Act in force in Liverpool prohibits, under a penalty, the use of threatening, abusive and insulting words and behaviour in the streets whereby a breach of the peace may be occasioned. On proof of these facts the Liverpool stipendiary magistrate bound him over in recognizances to be of good behaviour, and it was held by the King's Bench Division that the magistrate had jurisdiction so to do; for although Mr. Wise had not directly incited to the commission of breaches of the peace, he had used language the natural consequence of which was that breaches of the peace would be committed by others, and intended to hold similar meetings and use similar language in the future.[4]

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[1] *Per* Field, J., in *Beatty* v. *Gillbanks* (1882), 9 Q. B. D. at p. 314; cited with approval by Lord Alverstone, C. J., in *Wise* v. *Dunning*, [1902] 1 K. B. at p. 174.

[2] *Per* Fitzgerald, J., in *R.* v. *Justices of Cork* (1882), 15 Cox, at p. 155.

[3] *Per* Lord Alverstone, C. J., in *Wise* v. *Dunning*, [1902] 1 K. B. at pp. 175, 176.

[4] *Wise* v. *Dunning*, [1902] 1 K. B. 167.

CHAPTER V.

MALADMINISTRATION.

ONE potent cause of sedition, riot and breaches of the peace is the abuse of power by officers of State. All oppressive and overbearing acts on the part of those who are "drest in a little brief authority" are sternly forbidden by our law. Holders of the highest offices in the Empire have before now been severely punished for misconduct. Three Lord Chancellors—Michael de la Pole in 1384, Lord St. Albans (Sir Francis Bacon) in 1622, and Lord Macclesfield in 1725—were convicted of bribery on impeachment; while Lord Westbury was compelled to retire from office in 1865 in consequence of scandals connected with a near relative, whom he had appointed to a semi-judicial office. In 1626 the Earl of Middlesex, Lord High Treasurer of England, was found guilty of refusing to hear petitions referred to him till he had been bribed.[1] And Warren Hastings, the greatest of our Indian administrators, was forced to retire into private life, because of the cruelty and rapacity with which he was alleged to have treated the Begums of Oude.

In this chapter we shall deal with such offences as :—

I. Extortion and oppression.
II. Refusal to act.
III. Bribery and corruption.
IV. Offences against the purity of elections.

I. *Extortion and Oppression.*

If any public officer, in the pretended exercise of the duties of his office, illegally and from some improper motive takes from any person against his will any money or valuable thing which is not then due from that person, he is guilty of extortion. This is a high misdemeanour, punishable on information or indictment in the discretion of the Court with fine to any amount, imprisonment to any extent, or both, and also with removal from office. Again, if any public officer in the pretended exercise of the duties of his office illegally and from any improper motive inflicts injury on any person or abuses even a discretionary power which is vested in him by virtue of his office, he is guilty of oppression, which is a high misdemeanour similarly punishable.

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[1] See Stephen's History of the Criminal Law, Vol. III. p. 252.

In both these cases the improper motive is an essential ingredient in the crime. It is not enough that the act is illegal. An illegal act done by a public officer without any improper motive, and due to a *bonâ fide* mistake as to the extent in law of his powers, is not oppression. The existence of such improper motive may be inferred either from the act itself or from the surrounding circumstances.

It has been the law of the land ever since 1275 that any officer of the King, who takes any reward to do his office, is punishable at the King's pleasure.[1] Any clerk of assize, clerk of the peace, clerk of the court, or the deputy of any such officer, who exacts any reward to do his office, commits a misdemeanour, and on conviction is incapable of holding his office.[2] Again any gaoler, who exacts from any prisoner any fee for or on account of the entrance, commitment or discharge of such prisoner, commits a misdemeanour, and on conviction is incapable of holding his office.[3] Extortion by sheriffs or their officers is punishable in the same way as contempt of court.[4] And a coroner, who is guilty of extortion, corruption, wilful neglect of his duty or of misbehaviour in the discharge of his duty, is guilty of a misdemeanour, and on conviction is incapable of holding his office.[5]

Every public officer commits a misdemeanour, who in the discharge of the duties of his office commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.[6]

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[1] First Statute of Westminster, 3 Edw. I. c. 26.

[2] 55 Geo. III. c. 50, s. 9.

[3] *Ib.* s. 13.

[4] 50 & 51 Vict. c. 55, s. 29. See *post*, pp. 201—204.

[5] Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 8.

[6] Stephen, Digest of the Criminal Law, 6th ed., Art. 126. See the Official Secrets Act, 1911 (1 & 2 Geo. V. c. 28), *ante*, pp. 151—153; and *R.* v. *Mercerον* (1818), 2 Stark. N. P. 366.

II. *Refusal to Act.*

Our law not only condemns abuse of power by a public official: it also punishes all who refuse or neglect to discharge the duties of their office.

Every public officer, who wilfully refuses or neglects to perform any duty which he is by common law or by statute bound to perform, commits a misdemeanour, provided that such duty is not attended with greater danger than a man of ordinary firmness and courage might reasonably be called upon to encounter. For example, if a sheriff refuses to execute a criminal sentenced to death, he commits a misdemeanour;[1] so does a justice of the peace who refrains from reading the proclamation set out in the Riot Act, or from ordering soldiers to disperse a mob, because he is afraid to do so in circumstances in which a man of ordinary courage would not have been afraid.[2]

Every person, who unlawfully refuses or omits to serve any public office which he is by law required to accept if duly appointed, commits a misdemeanour. But this does not apply to cases in which the law imposes some other penalty for such refusal or neglect, or to cases in which a person is permitted by law or custom to make a composition in place of serving the office.

One of the greatest protections, which our law affords for the liberty of the person, is the writ of *Habeas Corpus*. If a man complains that he is illegally imprisoned, he or some one on his behalf is entitled to obtain this writ. It commands the person, in whose custody he is, to bring him bodily before the Court in order that it may be ascertained whether such imprisonment is illegal or not. Any act or contrivance by which a person so imprisoned is deprived of the protection of the writ will be severely punished. Thus a judge, who refuses to grant the writ on application made to him for good cause, is liable to a penalty of £500. Any gaoler, who refuses to make a return to the writ or neglects to deliver within six hours after demand by a prisoner or on his behalf a copy of the warrant or commitment under which he is detained, is in certain cases liable to a penalty of £100 and loss of office, and for a second offence to a penalty of £200;[1] in other cases he is liable, on motion made to the Court, to be sent to prison for contempt.[2] Any person who takes or sends a prisoner outside the realm in order that he may be beyond the protection of this writ is liable to the pains and penalties of a *præmunire*.[3]

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[1] *R.* v. *Antrobus* (1835), 2 A. & E. 798.

[2] *R.* v. *Pinney* (1832), 5 C. & P. 254.

Lastly, whenever an individual is injured by the refusal of a judicial or public officer to perform any duty imposed on him by his office, he may apply for a writ of *mandamus* to compel him to do his duty. The applicant for such a writ must show that he has a clear legal right to the performance of a certain act by the person against whom he asks the Court to issue the writ, and also that it is the imperative duty of such person to do that act. If such person has vested in him a discretion to do or not to do that act as he may think fit, no writ of *mandamus* will issue against him.[4] And if the applicant has any other remedy which is equally convenient, beneficial and effectual, the Court will not grant him a writ of *mandamus*.[5] Thus a *mandamus* to hear and determine a case will be granted against the judge of an inferior Court, who has declined to exercise his jurisdiction by refusing to hear a case; but it will not be granted against a judge of any superior Court.[6] In some cases, however, where a judge of an inferior Court refuses to give judgment in a case, the party who suffers from such delay may apply to the High Court for a writ of *procedendo ad judicium* commanding the judge to proceed to judgment.

III. *Bribery and Corruption.*

Any person holding judicial or other public office, who accepts any gift or payment offered to him in order to influence his conduct in respect of any business connected with such office, is guilty of bribery; so is the person who offers such gift or payment. It does not matter whether the gift or payment is made as a reward for past services or as an inducement for future favours, nor whether the thing which the officer is thus bribed to do is in itself a proper or improper act. It is a bribe whenever it is offered in relation to business which has been, is being or will be transacted, so long as it is business which comes before such person in the way of his office. The offence, which is not triable at Quarter Sessions, is a common law misdemeanour, punishable by fine or imprisonment.[1]

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[1] 31 Car. II. c. 2.

[2] 56 Geo. III. c. 100.

[3] See *ante*, p. 156.

[4] *R.* v. *Kensington* (1848), 12 Q. B. 654; *R.* v. *Vestry of St. Luke's, Chelsea* (1862), 31 L. J. Q. B. 50.

[5] *R.* v. *Commissioners of Inland Revenue* (1884), 12 Q. B. D. 461.

[6] See further as to the writ of *mandamus*, *post*, p. 1175.

Various statutes have dealt with special instances of the application of this general rule. Thus by the East India Company Act, 1793,[2] it is a misdemeanour for any British subject holding office in the East Indies to demand or receive any sum of money or other valuable thing as a gift or present. Again, by the Customs Laws Consolidation Act, 1876,[3] any officer of customs who takes a bribe is liable to a penalty of £500. By the Inland Revenue Regulation Act, 1890,[4] any collector, officer or person employed in relation to inland revenue, who asks for or receives any money or other recompense, or enters into or acquiesces in any collusive agreement with any person to do or abstain from doing or to conceal or connive at any act or thing whereby His Majesty is or may be defrauded, is liable to a penalty of £500, and is on conviction incapable of ever holding any office under the Crown.

The Public Bodies Corrupt Practices Act, 1889,[5] contains important provisions for the prevention and punishment of bribery and corruption by members, officers or servants of corporations, councils, boards and other public bodies. It provides that every person commits a misdemeanour who corruptly solicits, receives or agrees to receive for himself or for any other person any gift, loan, fee, reward or advantage whatever as an inducement or reward for or otherwise on account of any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter in which the public body is concerned.[6] The offender may be sentenced to two years' imprisonment, with or without hard labour, or fined £500, and in either case can be deprived for long periods from exercising any political rights, or from holding public office of any kind. A prosecution for an offence under this Act can only be instituted with the consent of the Attorney or Solicitor-General.

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[1] *R.* v. *Whitaker*, [1914] 3 K. B. 1283. 3 K. B 1283.

[2] 53 Geo. III. c. 52, s. 62.

[3] 39 & 40 Vict. c. 36, s. 217.

[4] 53 & 54 Vict. c. 21, s. 10.

[5] 52 & 53 Vict. c. 69. And see 6 Edw. VII. c. 34, and 6 & 7 Geo. V. c. 64.

[6] *Ib.* s. 1; see also *R.* v. *Edwards* (1895), 59 J. P. 88.

IV. *Offences in connection with Elections.*

Bribery at Parliamentary elections was at common law a misdemeanour punishable on indictment or information.[1] It does not, however, appear that any prosecution ever took place until the offence was made a statutory one, although the House of Commons in exercise of its exclusive privilege in matters relating to the constitution of its own body took cognizance of bribery as a ground for unseating its members. Acts of Parliament have from time to time been passed to secure purity of election, and to put a stop to that bribery and corruption which formerly was only too rife. By the Corrupt and Illegal Practices Prevention Acts, 1883 and 1895,[2] any candidate who has been guilty of any corrupt practice within the meaning of the Acts can never sit in the House of Commons for the constituency where such offence was committed. Even a voter who is guilty of any corrupt practice in reference to an election is not allowed to sit in the House of Commons for seven years. Treating, undue influence and bribery by an agent with the candidate's knowledge are also misdemeanours. Offences in reference to municipal and county council elections are dealt with in a similar manner.[3]

Personation is a felony, and is punishable with two years' imprisonment. Any one, who at an election applies for a ballot paper in some one else's name, whether that name be that of a person living or dead, or of a fictitious person, or who, having voted once at any such election in his own name, applies at the same election for another ballot paper, is liable to be convicted of this offence.[4]

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[1] *R.* v. *Pitt* (1762), 3 Burr. 1338.

[2] 46 & 47 Vict. c. 51 ; 58 & 59 Vict. c. 40.

[3] See 47 & 48 Vict. c. 70 and 1 & 2 Geo. V. c. 7.

[4] Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 24.

CHAPTER VI.

OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE.

IT is of national importance that the administration of justice in our law Courts should be pure and unsullied, free from all suspicion of bias or prejudice, firm and impartial in the strict administration of law to persons of all classes alike. Legal proceedings must not be made the instrument of extortion or oppression, nor must the Courts be misled by perjury or fraud. Their decrees, when once pronounced, must be effective and rigidly enforced by the strong arm of the law.

We will examine first the precautions which are taken with the object of securing that all evidence given in our law Courts shall be true.

False Evidence.

If any person who has been lawfully sworn as a witness or as an interpreter in a judicial proceeding wilfully makes a statement material in that proceeding, which he knows to be false or does not believe to be true, he is guilty of perjury. This offence seems not to have been treated as a crime till the year 1613. It is now a statutory misdemeanour, punishable with seven years' penal servitude.[1] This crime is dealt with in detail on pp. 195 *et seq.*

Subornation of perjury was made penal before perjury itself—namely in 1540. It consists in hiring or procuring another person to make a false statement on oath under such circumstances as would constitute perjury in the suborner. To amount to subornation the oath must be in fact taken and the false statement actually made: otherwise the would-be suborner is guilty only of inciting.

"Every person, who aids, abets, counsels, procures or suborns another person to commit an offence against this Act, shall be liable to be proceeded against, indicted, tried and punished as if he were a principal offender. Every person, who incites or attempts to procure or suborn another person to commit an offence against this Act, shall be guilty of a misdemeanour and, on conviction thereof on indictment, shall be liable to imprisonment, or to a fine, or to both such imprisonment and fine."[1]

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[1] Perjury Act, 1911 (1 & 2 Geo. V. c. 6), s. 1 (1).

Any conspiracy to defeat the ends of justice, *e.g.*, by dissuading witnesses from giving evidence or by obstructing any legal process, civil or criminal, is a misdemeanour.[2] So is any conspiracy to accuse another falsely of a crime.[3]

Again any one, who fabricates a false document, which if genuine would be admissible in evidence in any judicial proceeding, or tenders such a document in evidence knowing it to have been so fabricated, is liable to the same punishment as a witness who is convicted of perjury. It is a felony punishable with penal servitude for life or for various terms of years for any one to forge official or public documents, foreign or colonial acts of State and judgments, orders of an English Court, registers, by-laws, registers of British vessels, certificates of convictions or acquittals, examined or certified copies of any of these documents, or to tender the same in evidence knowing them to have been forged.[4] So the fraudulent fabrication of real evidence—as, for example, by tampering with sealed samples—is a misdemeanour at common law.[5]

A man who wilfully makes a false statement on oath, but not in a judicial proceeding, is not guilty of perjury. But he was at common law guilty of the misdemeanour of "making a false oath," and was punishable with two years' imprisonment without hard labour. A more severe punishment is now assigned by the Perjury Act, 1911,[6] which enacts that "if any person—

(i.) being required or authorised by law to make any statement on oath for any purpose, and being lawfully sworn (otherwise than in a judicial proceeding), wilfully makes a statement which is material for that purpose and which he knows to be false or does not believe to be true;[1] or

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[1] S. 7.
[2] *R.* v. *Mawbey* (1796), 6 T. R. 619; 3 R. R. 282.
[3] 14 & 15 Vict. c. 100, s. 29.
[4] Forgery Act, 1913 (3 & 4 Geo. V. c. 27), s. 3.
[5] *R.* v. *Vreones*, [1891] 1 Q. B. 360.
[6] Ss. 2, 3 (1).

(ii.) wilfully uses any false affidavit for the purposes of the Bills of Sale Act, 1878, as amended by any subsequent enactment; or

(iii.) for the purpose of procuring a marriage or a certificate or licence for marriage, knowingly and wilfully makes a false oath,

he shall be guilty of a misdemeanour and, on conviction thereof on indictment, shall be liable to penal servitude for a term not exceeding seven years or to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine."

The Act also makes it a misdemeanour for any one knowingly and wilfully to make or sign a false declaration, notice or certificate required by any Act of Parliament relating to marriage, or to insert or cause to be inserted in any register of births, deaths or marriages a false statement as to any particular required by law to be registered therein, or to make a statement false in a material particular in a statutory declaration or in any document which he is authorised or required by any public Act of Parliament to make, attest or verify.[2]

None of the offences which are now punishable under the Perjury Act, 1911, can be tried at Quarter Sessions.[3]

Perjury.

It is necessary to deal fully with the crime of perjury, which is thus defined in section 1 of the Perjury Act, 1911:—

"If

(i.) any person lawfully sworn as a witness or as an interpreter

(ii.) in a judicial proceeding

(iii.) wilfully makes a statement

(iv.) material in that proceeding,

(v.) which he knows to be false or does not believe to be true,

he shall be guilty of perjury, and shall, on conviction thereof on indictment,[4] be liable to penal servitude for a term not exceeding seven years, or to imprisonment with or without hard labour for a term not exceeding two years, or to a fine or to both such penal servitude or imprisonment and fine."[1] Where the perjury or any offence punishable as perjury is committed in any place outside the United Kingdom, the offender may be proceeded against either by indictment or on criminal information, and tried, and punished in any county or place in England where he was apprehended or is in custody.[2]

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[1] It is submitted that if a person be indicted for perjury under s. 1 of this Act and the proceeding before the Court turn out to be non-judicial, the accused could be convicted under s. 2 (1), the words referring to the judicial proceeding being struck out of the indictment: see *R.* v. *Hodgkiss* (1869), L. R. 1 C. C. R. at p. 212.

[2] Ss. 3, 5.

[3] S. 10.

[4] For a form of indictment for perjury see Appendix, Precedent No. 25, and s. 12 of the Act.

We propose to deal separately with each of the above five heads.

(i.) The statement must have been made on oath. "The forms and ceremonies used in administering an oath are immaterial, if the Court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question, and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection, or has declared to be binding on him."[3] The evidence may be given either orally in the witness-box or in writing as in an affidavit. If, through some oversight on the part of the officer of the Court, no oath is in fact administered, the defendant cannot be convicted of perjury, although he believed himself to have been duly sworn.

Many persons, however, who have a conscientious objection to taking an oath or who have no religious belief, are now allowed to give evidence in Court on making a solemn affirmation or declaration that they will speak the truth, the whole truth and nothing but the truth,[4] and under the Perjury Act, 1911, the expression "oath" in the case of persons for the time being allowed by law to affirm or declare instead of swearing includes "affirmation" and "declaration," and the expression "swear" in the like case includes "affirm" and "declare."[5]

A child, whose unsworn evidence has been received in a criminal case,[6] and who wilfully gives false evidence, cannot be indicted for perjury,[1] but is liable on summary conviction to such punishment as is provided by section 11 of the Summary Jurisdiction Act, 1879,[2] in the case of juvenile offenders.

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[1] S. 1.

[2] S. 8, and see s. 1.

[3] S. 15 (1).

[4] See the Oaths Act, 1888 (51 & 52 Vict. c. 46), ss. 1, 2.

[5] S. 15 (2).

[6] The provisions of s. 30 of the Children Act, 1908 (8 Edw. VII. c. 57), are extended to all criminal proceedings by s. 28 (2) of the Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58).

The amount of punishment, which the Court can give on a conviction for perjury, does not depend on the number of "assignments of perjury," as they are called, but on the number of oaths taken and broken. For each such false oath the defendant may be sentenced to seven years' penal servitude, although only one of his statements made on that oath be proved false. But if he was sworn on two occasions, and on each occasion wilfully made the same false statement, he can be sent to penal servitude for fourteen years.

(ii.) He must have been sworn in a judicial proceeding. This expression "includes a proceeding before any Court, tribunal or person having by law power to hear, receive and examine evidence on oath."[3] Thus if a false statement be wilfully made in an affidavit or given on commission in England for the purpose of being used in a judicial proceeding in any English, colonial or foreign Court, this is perjury and triable here.[4] A prisoner who pleads guilty and is subsequently sworn as a witness can be convicted of perjury.[5] If the oath is not administered in a judicial proceeding, the crime is not perjury, but the misdemeanour of making a false statement on oath, which is punishable with equal severity under section 2 of the Perjury Act, 1911. But a false statement made on oath before a court-martial,[6] or in any arbitration within the Arbitration Act, 1889,[7] or under the Workmen's Compensation Act, 1906,[8] is punishable under section 1 as these Courts have power to hear evidence on oath.

It was formerly necessary that the Court in which the alleged perjury was committed should not only have power to administer an oath, but also tha it should have jurisdiction to try the case then before it.[9] But the Act o 1911 contains no words requiring the latter, and the omission is probably intentional. It would seem, therefore, that if a man was indicted before a Court of Quarter Sessions for a misdemeanour which that Court had no power to try—*e.g.*, an offence within section 20 of the Larceny Act, 1916 [1]—false evidence given in that proceeding might now be made the subject of an indictment for perjury.

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[1] Perjury Act, 1911 (1 & 2 Geo. V. c. 6), s. 16 (2).

[2] 42 & 43 Vict. c. 49.

[3] S. 16 (2).

[4] S. 1 (4), (5), and s. 8

[5] *R.* v. *Wheeler*, [1917] 1 K. B. 283.

[6] *R.* v. *Heane* (1864), 4 B. & S. 947.

[7] 52 & 53 Vict. c. 49, s. 22.

[8] 6 Edw. VII. c. 58; and see *R.* v. *Crossley*, [1909] 1 K. B. 411.

[9] 3 Co. Inst. 166; *R.* v. *Dunning* (1871), L. R. 1 C. C. R. 290.

The false evidence must have been given at a regular sitting of the Court, and the Court must have been properly constituted. But a mere flaw in the preliminary proceedings will afford a perjurer no defence.

Thus it was held that, where a debtor at his examination in bankruptcy gave false answers to questions put to him in the temporary absence of the presiding registrar, he could not be convicted of perjury.[2]

A police constable, called Hughes, procured a warrant to be issued, without a written information on oath, for the arrest of a man named Stanley, on a charge of "assaulting and obstructing him in the discharge of his duty." On this warrant Stanley was irregularly arrested and brought before the magistrates, who convicted him on the testimony of Hughes. Hughes was afterwards indicted for perjury committed at the trial of Stanley. He contended that he ought to be acquitted on the ground that the original informality invalidated the whole of the proceedings against Stanley, in which he gave evidence. It was held, however, that Hughes was rightly convicted, although there was neither written information nor oath to justify the issue of the warrant; and that the magistrates had jurisdiction to try the charge, especially as Stanley, when brought before them, raised no objection to the trial proceeding.[3]

Any judge of a Court of Record or of a petty sessional Court, or any justice of the peace sitting in special sessions, or any sheriff before whom a writ of inquiry or a writ of trial is executed, who is of opinion that any person has been guilty of perjury in the course of a proceeding before him, may order the prosecution of such person and commit him for trial.[4]

(iii.) Next, the statement must have been made wilfully—that is, deliberately and with the intention of perverting the course of justice. It is not necessary that the statement should be made "corruptly," if that word is understood as meaning that the witness was hired to commit perjury. Of course, if a misstatement be made through forgetfulness or some honest blunder, no crime is committed. But a witness cannot escape liability by qualifying his statements by such phrases as "I believe" or "I think," if in fact he does not so believe or think.[1]

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[1] 6 & 7 Geo. V. c. 50, s. 38 (1) (b).

[2] *R.* v. *Lloyd* (1887), 19 Q. B. D. 215.

[3] *R.* v. *Hughes* (1879), 4 Q. B. D. 614.

[4] S. 9.

(iv.) The statement must be material in the proceeding —that is, it must be of such a nature that it may directly or indirectly affect the decision of the tribunal. "The question whether a statement on which perjury is assigned was material is a question of law to be determined by the Court of trial."[2] It need not be "material" in the strict sense of that word. It need not be strictly relevant to any issue in the proceeding; it may have been given in answer to a question put merely "to credit."[3] It may even be evidence which properly ought not to have been admitted.[4] It is sufficient if it in any way affects the credit of any witness, or the probability or improbability of any matter of fact alleged by either party in the proceeding.

(v.) At the time of making the statement the accused must know that it is false or else "not believe it to be true." To establish this, the prosecution has in almost every case to prove first that the statement is false in fact. There is, however, authority for holding that if the defendant spoke the words wilfully and deliberately and in the belief that they were false, he can be convicted of perjury, even though they should ultimately turn out to be true.[5] And though this decision was doubted, it is now good law since the passing of the Perjury Act, which nowhere requires that the words should in every case be false.

It is sufficient if one assignment of perjury be proved false. On the issue whether the defendant's words were true or false—though on no other issue in a case of perjury—he cannot be convicted solely upon the evidence of one witness.[6] But it is not always necessary to call two witnesses; the evidence of one witness will be sufficient, if he be corroborated in some material particular. Such corroboration may consist of a verbal or written admission made by the defendant contradicting his own evidence.

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[1] *R.* v. *Schlesinger* (1847), 17 L. J. M. C. 29; 2 Cox, 200.

[2] S. 1 (6).

[3] *R.* v. *Baker*, [1895] 1 Q. B. 797.

[4] See *R.* v. *Gibbons* (1862), 31 L. J. M. C. 98.

[5] *Gurney's Case* (1612), 3 Inst. 166. Cf. *R.* v. *Mawbey* (1796), 6 T. R. 619; 3 R. R. 282.

S. 13.

Thus, a letter written by the defendant either before or after he is alleged to have committed perjury may be sufficient corroboration of a single witness, who has sworn to the falsity of the defendant's statement.[1] But where the only evidence tendered of the falsity of the perjury alleged in the indictment was that on another occasion the defendant had sworn the exact opposite, Gurney, B., held that, as there was nothing before him to show which of these contradictory statements was true and which was false, the defendant must be acquitted.[2]

Lastly, the prosecution must prove what was the state of the prisoner's mind at the time when he made the statement. If he knew or believed that the evidence which he was giving was false, that is sufficient. If he was in entire ignorance on the matter and knew that he was ignorant, his making a positive statement as to it was equivalent to an assertion that he knew what he was saying to be true, and he can be punished for his reckless assumption of knowledge. If he purposely used words which he knew would convey a wrong meaning to those who heard them, he can be convicted of perjury, although the words apart from such meaning may have been literally true; for in such a case he did intend to convey that which was false.

Thus in a gruesome old case, where the defendant had cut off a dead man's hand and with it had signed, sealed and delivered a deed, and had then sworn that he saw the deed sealed and delivered by the dead man's own hand, it was held that in purposely conveying a wrong meaning by the use of words which were literally true he had taken a false oath.[3]

Embracery.

The verdict of a jury must be obtained only by the evidence and arguments laid before them in open court. An attempt to influence jurors by bribes or any other corrupt means is called embracery. It is a high misdemeanour punishable by fine and imprisonment to any extent in the discretion of the Court. This offence is now very rare, but a man was convicted of it at the Central Criminal Court in 1891.[1] It does not matter whether the attempt did in fact influence the verdict or not, nor whether the verdict actually given was right or wrong. The indictment must state the names of the jurors alleged to have been "embraced." Any juror who wilfully and corruptly consents to embracery is punishable under the Juries Act, 1825,[2] and is also liable to a penal action under an ancient statute of Henry VIII.[3]

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[1] *R.* v. *Hook* (1858), 27 L. J. M. C. 222; *R.* v. *Hare* (1876), 13 Cox, 174.

[2] *R.* v. *Wheatland* (1838), 8 C. & P. 238.

[3] *The Keepers of the Liberties of England* v. *Howell Gwinn* (1652), Style, 336; Kenny's Select Cases, 416.

Contempt of Court.

It is a contempt of Court to do or to write or say anything which tends to bring the administration of justice in this country into contempt, to diminish the authority and dignity of our law Courts, to prejudice the fair trial of any cause or matter whether civil or criminal, or in any way to obstruct the course of justice. Thus it is a contempt of Court to insult the judge, jury or witness, to obstruct any officer of the Court, to abuse the parties to an action or their witnesses before the case is heard, or in any way to endeavour to prejudice the minds of the judge, jury or general public.

"There are three different sorts of contempt:—

One kind of contempt is scandalising the Court itself.

There may be likewise a contempt of this Court, in abusing parties who are concerned in causes here.

There may be also a contempt of this Court, in prejudicing mankind against persons before the cause is heard.

There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."[4]

But fair criticism on the proceedings of a Court, when once the case referred to is over, can seldom, if ever, be contempt of Court.[5] "There is no sedition in just criticism on the administration of the law. . . . A writer may freely criticise the proceedings of Courts of justice and of individual judges—nay, he is invited to do so, and to do so in a free and fair and liberal spirit. But it must be without malignity, and not imputing corrupt and malicious motives."[1]

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[1] See *R.* v. *Baker*, 113 Cent. Crim. Ct. Sess. Papers, 374.

[2] 6 Geo. IV. c. 50, s. 61.

[3] 32 Hen. VIII. c. 9, s. 3.

[4] *Per* Lord Hardwicke, L. C., in *Roach* v. *Garvan, Re Read and Huggonson* (1742), 2 Atk. at p. 471.

[5] *McLeod* v. *St. Aubyn*, [1899] A. C. 549.

Acts frequently amount to contempt of Court, and are punishable by attachment, as where the offender assaults an officer of the Court when serving its process or carrying out its orders, or destroys the records of the Court or documentary evidence which should be brought before it, or personates a juryman.[2] Again, contempt of Court may be committed by words, as where the offender publishes a report of proceedings which the Court has forbidden to be reported, or libels one of the parties before the commencement of the trial. The result and sometimes the object of such attacks is to destroy the confidence which Englishmen have in their law Courts, and thus "to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially and with reference solely to the facts judicially brought before it," and without prepossession or prejudice.[3]

Disobedience to a lawful order of the Court is in some cases a criminal offence;[4] in others it exposes the person in default to merely civil penalties, such as the dismissal of his action or the striking out of a portion of his Defence. So any act which is done for the express purpose of rendering an order of the Court ineffectual is a contempt of Court.[5] Under the Habeas Corpus Act[6] it is a misdemeanour, punishable with the pains and penalties of a *præmunire*,[7] to unlawfully send any prisoner outside the realm, so that he would be beyond the protection of the writ of *habeas corpus*; for there is no power in the High Court or in any judge of it to order the issue of a writ of *habeas corpus* directed to a person, who at the date of the order is out of the jurisdiction.[8]

Any acts or words, which amount to a contempt of Court, may, as we have seen,[9] afford ground for a prosecution for sedition. But they may be also dealt with summarily by the Court itself. This power is inherent in every Court of Record. It may be exercised either on the application of any person aggrieved, or by the Court of its own motion. The offender is usually served with a notice of motion, though in very grave cases a warrant may be issued to bring him before the Court under arrest. A motion to commit the offender is often accompanied by a motion for an injunction to restrain him from any further contemptuous acts of a similar kind. Affidavits may be filed on both sides; there is no jury; the Court offended itself hears the case and fixes the punishment, inflicting either a fine or imprisonment for a time certain, or both, to any extent in its discretion. The offender, however, is often released after a short period of confinement, if he apologises and so "purges his contempt."

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[1] *Per* Fitzgerald, J., in *R.* v. *Sullivan* (1868), 11 Cox, at p. 49.
[2] *R.* v. *Levy* (1916), 32 Times L. R. 238.
[3] *Per cur.* in *R.* v. *Parke,* [1903] 2 K. B. at p. 436.
[4] *In re Freston* (1883), 11 Q. B. D. 545.
[5] See *Adlam* v. *Colthurst* (1867), L. R. 2 Adm. & Eccl. 30.
[6] 31 Car. II. c. 2.
[7] See *ante,* p. 156.
[8] *R.* v. *Pinckney,* [1904] 2 K. B. 84.
[9] *Ante*, pp. 155, 157.

A superior Court of Record has power thus to interfere summarily and to fine the offender or commit him to prison in all cases, in which an indictment for sedition would lie, and in some others in which it would not.[1] It is in this case immaterial whether the contempt be committed in the presence of the Court or at a time when the Court is not sitting and at a distance from it.[2]

An inferior Court of Record, however, can only commit an offender to prison where the contempt was committed in open Court.[3] The judge must at the moment be actually discharging his duty; and the words employed or act done must either be pointedly and personally disrespectful to the judge himself, or else amount to a serious obstruction of the course of justice.

An inferior Court not of Record has at common law no power to commit for contempt; but in a few cases such a power has been expressly conferred by statute.[4] It can, however, always eject any one whose conduct is such as to obstruct the business of the Court, or order him to find sureties for his good behaviour.[5] But the High Court has jurisdiction to punish by attachment contempts of inferior Courts, especially if the case will in the ordinary course come before the High Court.[6]

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[1] *Per* Lord Holt, C. J., in *R.* v. *Rogers* (1702), 7 Mod. at p. 29.
[2] *Crawford's Case* (1849), 1 Q. B. 613.
[3] *R.* v. *Lefroy* (1873), L. R. 8 Q. B. 134; *R* v. *Judge of the County Court of Surrey* 1884), 13 Q. B. D. 963.
[4] See, for instance, 28 Vict. c. 36, s. 16.
[5] *McDermott* v. *Judges of British Guiana* (1868), L. R. 2 P. C. 341.
[6] *R.* v. *Parke*, [1903] 2 K. B. 432; *R.* v. *Davies*, [1906] 1 K. B. 32.

It is necessary that the Court should have power thus promptly to protect itself and the litigants before it. Latterly the tendency of our Courts has been to discourage all applications for committal where only a technical contempt of Court has been committed, which has done no harm to the complainant. But any deliberate attempt to prejudice the mind of the public against either party or his witnesses, or to prevent or obstruct the fair trial of the action, will certainly be punished. Thus any one, who hinders a witness from appearing to give evidence in a Court of justice, will be guilty of misdemeanour.[1]

But "committal for contempt of Court is a weapon to be used sparingly and always with reference to the interests of the administration of justice."[2]

"This is not a new-fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. . . . It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt."[3] "The essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on."[4]

Obstructing an Officer in the Execution of his Duty.

Some acts which are contempts of Court have also been made substantive offences by express statute. Thus it is now a misdemeanour, punishable with two years' imprisonment with hard labour, to assault, resist or wilfully obstruct a peace officer in the execution of his duty.[5] The fact that the accused did not know that the person assaulted was a peace officer acting in the execution of his duty furnishes no defence.[6]

If a constable sees a breach of the peace committed and finds himself unable to deal with it single-handed, he may call on any bystander to help him. Should the person thus called on refuse his assistance without lawful excuse, he is guilty of a misdemeanour. If however he does render assistance, any one who assaults or resists him is punishable to the same extent as if he had assaulted or resisted the officer himself.

Again, by the Customs Consolidation Act, 1876, it is a felony punishable with penal servitude for not less than three years to shoot at, maim or wound in the execution of his duty any officer of the army, navy, marines, coastguard, customs or excise, duly employed for the prevention of smuggling.[1] By the Poor Law Amendment Acts, 1850 and 1851, it is a misdemeanour to assault or obstruct any poor law officer in the exercise of his duty.[2] It is also a criminal offence to assault or obstruct any person aiding or assisting the officers above mentioned. Various other public officers are protected by other statutes.

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[1] *R.* v. *Stowell* (1843), 5 Q. B. 44.

[2] *Per cur.* in *McLeod* v. *St. Aubyn*, [1899] A. C. at p. 561.

[3] *Per* Lord Russell, C. J., in *R.* v. *Gray*, [1900] 2 Q. B. at pp. 40, 41.

[4] *Per* Lord Alverstone, C. J., in *R.* v. *Tibbits and Windust*, [1902] 1 K. B. at p. 88.

[5] 24 & 25 Vict. c. 100, s. 38.

[6] *R.* v. *Forbes and Webb* (1865), 10 Cox, 362.

To burn a dead body in order to prevent the coroner holding an inquest upon it has been held to be obstructing him in the discharge of his duty.[3] Cremation is however a perfectly lawful method of disposing of a dead body, provided that it is not resorted to in order to avoid a coroner's inquest, and provided also that the process is so conducted as not to be a nuisance.[4]

Escape and Rescue.

It is a misdemeanour to escape from lawful custody; and any officer who permits an escape is also indictable. If such officer has permitted the escape voluntarily, he is guilty of the same crime (whether treason, felony or misdemeanour) as the prisoner whom he has allowed to escape; if negligently, he is guilty of a misdemeanour. Aiding a prisoner to escape, or taking into prison any mask or disguise or any other article to help his escape, is a felony punishable with two years' imprisonment. Aiding a prisoner of war to escape is punishable with penal servitude for life.[5] If a prisoner in attempting to escape breaks out of prison, he is guilty of felony or misdemeanour, according to the crime of which he happens to have been convicted. But a prisoner detained for treason commits felony only by breaking out. As to what constitutes a breach of prison, the mere getting over a wall or through a window would not be sufficient. But it was held a sufficient breach, where a prisoner in getting over a wall accidentally dislodged some loose bricks placed there for the purpose of impeding escape and giving alarm.[1]

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[1] 39 & 40 Vict. c. 36, s. 193; and see 54 & 55 Vict. c. 69, s. 1.

[2] 13 & 14 Vict. c. 101, s. 9; 14 & 15 Vict. c. 105, s. 18.

[3] *R.* v. *Price* (1884), 12 Q. B. D. 247; *R.* v. *Stephenson* (1884), 13 Q. B. D. 331.

[4] See the Cremation Act, 1902 (2 Edw. VII. c. 8), s. 8. See indictment, No. 23, in the Appendix.

[5] 52 Geo. III. c. 156; 54 & 55 Vict. c. 69, s. 1 (2).

Rescue consists in forcibly freeing another from lawful custody.[2] The rescuer is guilty of the same offence as the rescued, but it is necessary that the principal should be convicted of it; otherwise the offence is only a misdemeanour. The rescuing, or attempted rescuing, of murderers is a felony punishable with penal servitude for life.

Maintenance and Champerty.

Every Court has inherent jurisdiction to prevent any abuse of its proceedings; it has power, for instance, to stay or dismiss any action before it which it deems to be frivolous, vexatious or oppressive.[3] The common law, with the same object, made criminal certain cases of wanton and officious intermeddling in the disputes of others, which are known as maintenance and champerty. "Maintenance is where any man giveth or delivereth to another that is plaintiff or defendant in any action any sum of money or other thing for to maintain his plea, or maketh extreame labour for him, when he hath nothing therewith to do."[4] It is immaterial whether the action maintained is or is not successful.[5] It is not maintenance to assist another in a criminal prosecution.

Champerty is one degree worse than maintenance; for to constitute this offence there must be a prior agreement between the parties that the person who assists the litigant shall, if the proceedings are successful, receive as his reward a portion of the lands recovered (*champ parti*—a field divided) or a share of the damages or proceeds of the suit, and it must be from this motive that he assists the litigant. These offences are common law misdemeanours. Various enactments, dating from the First Statute of Westminster,[6] have been passed from time to time dealing with these offences, but they are merely declaratory of the common law, and prescribe additional penalties.

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[1] *R.* v. *Haswell* (1821), R. & R. 458.

[2] See 1 & 2 Geo. IV. c. 88; 7 Will. IV. & 1 Vict. c. 91, s. 1.

[3] *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141; and see R. S. C. Order XXV. r. 4, and the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51).

[4] Termes de la Ley, p. 202.

[5] *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A. C. 368, approving *Oram* v. *Hutt*, [1914] 1 Ch. 98.

[6] 3 Edw. I. c. 25; 1 Rich. II. c. 4; 32 Hen. VIII. c. 9.

Although these enactments still remain on the statute book, a prosecution under them very seldom occurs; and were it not for occasional declarations by the judges that the law of maintenance still lives and is effective,[1] the criminal character of the offences might be deemed a thing of the past. But the question of maintenance not infrequently arises in civil cases, generally as a defence to an action upon a contract under a plea of illegality.[2] The law however permits a man to assist the litigation of another when he himself has, or *bonâ fide* believes that he has, a common interest with him in the result of the proceedings. Such interest may be present or future, vested or contingent, but it must be a pecuniary interest in the actual subject-matter of the action, and not merely a sentimental one.

Thus neighbours may combine to protect a right of way; and generally "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." [3]

Again, a father can assist his son in bringing an action, a landlord his tenant, a master his servant or a servant his master. So any man may assist his near kinsman—an expression which has received a liberal interpretation.

Further, it is not maintenance for a rich man to assist a poor man with money or advice in order to enable him to bring or defend an action, provided such assistance is given out of pure charity,[4] and such assistance is none the less charitable, though induced by common religious belief.[5] But if a rich man advances money to a poor man at an exorbitant rate of interest, or on the terms that the borrower pays him a portion of the damages which he recovers, he can be convicted of maintenance; for his motive in advancing the money is not pure charity, but self-seeking.

Lastly, it has been held that, in certain circumstances, it is not maintenance for a tradesman to maintain his customers;[6] for instance, he may agree to indemnify them against actions brought against them by reason of their purchase and user of his goods. "It is impossible to be certain that there are not many other exceptions which have equal validity."[1]

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[1] See the remarks of Lord Coleridge, L. C. J., in *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. at p. 14. As to common barratry, see *post,* p. 246.

[2] See *post,* p. 734.

[3] Order XVI. r. 9; and see *Bedford* v. *Ellis,* [1901] A. C. 1. It is for this reason no doubt that it is not maintenance to assist another in a criminal prosecution, as all are interested in bringing an alleged criminal to trial.

[4] *Harris* v. *Brisco* (1886), 17 Q. B. D. 504.

[5] *Holden* v. *Thompson,* [1907] 2 K. B. 489.

[6] *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co., Ltd.,* [1908] 1 K. B. 1006.

Champerty and maintenance are criminal only in connection with civil proceedings: misprision and compounding, only in connection with criminal proceedings, and not with all criminal proceedings. In the first two cases the offence consists in unlawfully stirring up or promoting the litigation; in the latter two cases, on the contrary, the offence consists in attempting to stifle, or refusing to aid in, the prosecution of a criminal. The King alone can pardon a crime. It is the duty of every subject to assist in bringing to justice any one guilty of a serious offence. If a felony has been committed, any private citizen may arrest any person whom he honestly and reasonably believes to have committed it. If he knows that A. B. has committed treason or felony, he is guilty of misprision if, when opportunity offers, he neither tries to arrest A. B. himself nor gives information to the police. It is a worse offence if for some reward to himself he agrees not to prosecute the offender: this is called "compounding" the crime, and is a misdemeanour. If he rescues or conceals a felon or helps him to escape from justice, knowing that he is a felon, he becomes, as we have seen, an accessory after the fact to the original felony.[2]

Misprision.

A misprision is the passive omission to do one's duty as distinct from active misbehaviour. Thus, if any one knows of treason and conceals it, though he in no way assents to or approves of it, he is guilty, as we have seen,[3] of misprision of treason. The least degree of assent to it would make him a principal traitor. So any one, who stands by and observes the commission of a felony, and makes no attempt to apprehend the offender, and gives no information to the police, is guilty of misprision of felony, which is a misdemeanour. The least act of encouragement or assistance will make him a felon either as principal or accessory. The punishment for misprision of felony is fine or imprisonment for any time not exceeding a year and a day.[1] It is no crime to misprise a misdemeanour.

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[1] *Per* Moulton, L. J., [1908] 1 K. B. at p. 1014.

[2] *Ante*, p. 135.

[3] *Ante*, p. 151.

Compounding.

Compounding a felony is a misdemeanour. If a man knows that a felony has been committed and who it was that committed it, and then agrees for valuable consideration not to prosecute the felon or to endeavour to prevent his prosecution by others, he is guilty of compounding the felony. Thus, if the owner of goods which have been stolen receives back his goods or obtains their value by promising not to prosecute, he is compounding a felony. So if a man prefers a criminal charge and then for valuable consideration promises not to proceed with it. But if he merely takes possession of his own property again wherever he can find it, he commits no offence, provided no favour be shown to the thief. A third person, not the owner of the goods stolen, can be guilty of this offence.[2]

By 18 Eliz. c. 5, it is a misdemeanour for an informer to bring an action under a penal statute and then to compound it without the leave of the Court. By 24 & 25 Vict. c. 96, s. 101, any person taking money or reward from the owner of goods that have been stolen or obtained by false pretences or embezzled, under the pretence (real or false) of helping him to recover them, is guilty of felony, unless he shall have used all due diligence to cause the offender to be brought to trial. And by s. 102 of the same Act, any person publishing advertisements for the recovery of stolen property, promising that no questions will be asked, &c., is liable to a penalty of £50 ; and so is the printer and publisher of the paper, but in this case the action must be brought within six months and with the leave of the Attorney-General or Solicitor-General.

As to compounding a misdemeanour, the law is not clear. There is no case reported in which any one has been convicted of such an offence.[1] Still in grave cases, such as perjury or riot, it would probably be held a crime to agree to stifle a prosecution for reward. And such an agreement clearly would be invalid.[2] But in some less serious cases such an agreement is not unlawful; indeed it is often sanctioned by the Court; and the sanction of the Court cannot make legal that which is criminal. After a prosecution to verdict any arrangement may be made between the prosecutor and the accused with the consent of the Court, and the Court will modify its sentence accordingly. In the case of an assault it is not illegal for a man to promise not to prosecute, if amends be made him; but no such compromise will oust the jurisdiction of a criminal Court, unless the Court has sanctioned it. And generally, wherever the injured party has both a civil and a criminal remedy, and might therefore have sued and recovered damages instead of prosecuting the misdemeanant, such a compromise is not illegal and will be enforced, though it was made without the sanction of the Court.[3] But whenever public order or decency or any public right is concerned, any such agreement is invalid and will not bind the Crown, even if it was sanctioned by the Court; and the same or any other prosecutor can continue the prosecution.[4]

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[1] Statute of Westminster, 1275, 3 Edw. I. c. 9. The same statute inflicts severer punishment on an officer or constable guilty of such misprision.

[2] *R.* v. *Burgess* (1885), 16 Q. B. D. 141.

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[1] See the judgment of Palles, C. B., in *Dillon* v. *O'Brien* (1887), 20 L. R. Ir. 316; 16 Cox, 245.

[2] *Collins* v. *Blantern* (1767), 1 Smith's L. C., 12th ed., 412.

[3] *Fisher* v. *Apollinaris Co.* (1875), L. R. 10 Ch. 297.

[4] *R.* v. *Wood* (1832), 3 B. & Ad. 657; *Keir* v. *Leeman* (1844), 6 Q. B. 308; (1846), 9 Q. B. 371; *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D 351.

CHAPTER VII.

OFFENCES AGAINST RELIGION.

Heresy and Nonconformity.

CHRISTIANITY is the religion by law established in this realm. Nevertheless heresy is no crime. Heresy is the deliberate selection and adoption of a particular set of views or opinions on matters of religion, which the majority consider erroneous. For any one to persist in the tenet of his choice after its error and its injurious tendency have been pointed out to him—though at common law no crime—was regarded as a sin, and the obstinate heretic who refused to recant was bidden to do penance for the good of his soul. The secular Courts took no cognizance of any man's religious opinions; and indeed before the days of Wiclif heretics were scarce. Towards the end of the fourteenth century, however, heresy came to be regarded as a crime punishable with death; and Acts were passed in the reigns of Henry IV. and Henry V., which condemned all heretics to be burnt alive and gave the clergy the power of defining heresy just as they pleased. Terrible use was made of these Acts, especially in the reign of Queen Mary. But by the 1 Eliz. c. 1, s. 6, all statutes relating to heresy were repealed. "At this day," says Sir Edward Coke,[1] "no person can be indicted or impeached for heresy before any temporal judge, or other that hath temporal jurisdiction." By the 29 Car. II. c. 9, s. 1, the writ *de hæretico comburendo* was abolished. It is not known that any layman has been prosecuted for heresy since 1640.

Again, the Church of England is the Church by law established in England. Yet nonconformity is no crime. No

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[1] 12 Rep. 57.

Court, civil or ecclesiastical, can any longer proceed against a layman for mere nonconformity. By the 4th section of the Toleration Act,[1] no dissenter shall be prosecuted in any Ecclesiastical Court for or by reason of his nonconformity to the Church of England. "The canon law forms no part of the law of England, unless it has been brought into use and acted upon in this country: the burden of proving which rests on those who affirm the adoption of any portion of it in England."[2] The Ecclesiastical Courts of the Church of England no longer possess any criminal jurisdiction over laymen. "As against laymen, whatever may be the nature of the charge, undoubtedly the Court has no jurisdiction to entertain a criminal suit."[3] "Speaking generally, and setting aside for the moment all questions as to the clergy, it cannot, I think, be doubted that a recurrence to the punishment of the laity for the good of their souls by Ecclesiastical Courts would not be in harmony with modern ideas, or the position which ecclesiastical authority now occupies in the country. Nor do I think that the enforcement of such powers, where they still exist, if they do exist, is likely to benefit the community."[4]

Even over clergymen of the Established Church the power of the Ecclesiastical Courts on questions of heresy is very limited. The judgment of Her Majesty's Privy Council (including the Archbishop of Canterbury) decided that it is not an ecclesiastical offence, even for the clergy, to dispute the dates and authorship of the several books of the Old and New Testaments, to deny that the whole of the Holy Scriptures was written under the inspiration of the Holy Spirit, to reject parts of Scripture upon their own opinion that the narrative is inherently incredible, to disregard precepts in Holy Writ because they think them evidently wrong, so long as they do not contradict any doctrine laid down in the Articles or Formularies of the Church of England.[5]

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[1] 1 Will. & Mary, c. 18. Although by s. 17 it was provided that the benefits of the Act should not extend to Unitarians, this exception was repealed in 1813 by the statute 53 Geo. III. c. 160.

[2] *Per* Lord Denman, C. J., in *R.* v. *The Archbishop of Canterbury* (1848), 11 Q. B. at p. 649; and see *Middleton* v. *Croft* (1734, 1736), Lee's Cases temp. Hardwicke, 57, 326; Year Book, 34 Hen. VI. fo. 38 (1459); Priscot, c. 5; Fitzh. Abr. quare imp. 89; Bro. Abr. quare imp. 12.

[3] *Per* Sir H. Jenner Fust in *Burder* v. —— (1844), 3 Curteis, at p. 827; and see *Woods* v. *Woods* (1840), 2 Curteis, 516.

[4] *Per* Lord Penzance in *Phillimore* v. *Machon* (1876), 1 P. D. at p. 487.

[5] *Williams* v. *Bishop of Salisbury*, *Wilson* v. *Fendall* (1864), 2 Moore P. C. (N. S.) 375; Brodrick & Fremantle, 247; *Gorham* v. *Bishop of Exeter* (1850), *ib.* 64.

Blasphemy.

It is a misdemeanour to speak, or to write and publish, any profane words vilifying or ridiculing God, Jesus Christ, the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary. This intent is an essential element in the crime, and is generally inferred from the intemperate and scurrilous language of the accused.[1] The disputes of learned men, and publications discussing with decency questions as to Christianity and the Scriptures, are not punishable as blasphemy. If the decencies of controversy are observed, even the fundamentals of religion may be attacked. A man is free to teach what he likes as to religious matters, even if it is unbelief, but in considering whether he has exceeded the permitted limits, the place where he speaks, and the people to whom he speaks, have to be taken into account. If he is arguing for an honest belief in a doctrine or a non-doctrine to which he is attached, he is not guilty of publishing blasphemous words.[2] But if, not for the sake of argument, he makes a scurrilous attack on doctrines, which the majority of persons hold to be true, in a public place where passers-by may have their ears offended and where young people may come, he renders himself liable to the law of blasphemy.[3]

The offence is not triable at Quarter Sessions.

Heresy and blasphemy, then, are entirely distinct and different things, both in their essence and in their legal aspect. Originally, both were ecclesiastical offences not cognizable in the secular Courts. Then statutes were passed under which both became crimes punishable in the ordinary law Courts. Now heresy is once more a purely ecclesiastical offence, punishable only in the clergy; while blasphemy is the technical name for a particular offence against the State. It is a crime against the peace and good order of society, an outrage on men's religious feelings, tending to a breach of the peace.

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[1] *Per* Lord Coleridge, L. C. J., in *R.* v. *Ramsay and Foote* (1883), 48 L. T. at p. 739; 15 Cox, 231. See *R.* v. *Bradlaugh* (1883), 15 Cox, 217; Odgers' Libel and Slander (5th ed.), Chap. XVII., Blasphemous Words.

[2] *R.* v. *Ramsay and Foote* (1883), 15 Cox, 231; *Bowman* v. *Secular Society, Ltd.*, [1917] A. C. 406.

[3] *R.* v. *Boulter* (1908), 72 J. P. 188; and see the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 7.

The Ecclesiastical Courts cannot take cognizance of any blasphemous publication, which is punishable in the secular Courts. For "where the common or statute law giveth remedy *in foro seculari* (whether the matter be temporal or spiritual), the conusance of that cause belongeth to the King's temporal Courts only."[1] Hence it is only over blasphemous libels not punishable by the common law or under any statute that the Ecclesiastical Courts can have any jurisdiction at all.[2]

Sacrilege and Brawling.

The law protects all places of worship, Christian, Jewish or whatever they may be, from felonious entry by dishonest persons. It also forbids all unseemly interruption and disturbance during the hours of Divine service in any church, chapel or other place of worship, belonging to any religious denomination.

It is sacrilege to break and enter, whether by day or by night, any place of Divine worship and commit any felony therein; or, being in any such place of worship, to commit a felony therein, and then break out. The offence in either case is a felony punishable with penal servitude for life,[3] and cannot be tried at Quarter Sessions.[4] It is also a felony, punishable with penal servitude for seven years, to break and enter at any time of the day or night any place of worship with intent to commit a felony therein.[5] It is sufficient if the vestry be broken into, for the vestry is part of the place of Divine worship.[6]

Disturbing public worship is a statutory misdemeanour.[7] Under this head would be included the disturbing or molesting of the preacher or of any of the congregation, and the interruption of any Divine service legally performed. "Brawling" consists of "riotous, violent or indecent behaviour" in any church or chapel, or in the grounds of such a building, and may be punished summarily by fine (not exceeding £5) or imprisonment (not exceeding two months).[8]

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[1] Coke upon Littleton, 96 b, and see *Phillimore* v. *Machon* (1876), 1 P. D. 481.

[2] *R.* v. *Curl* (1727), 2 Str. 788; 1 Barnard. 29.

[3] Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 24.

[4] 5 & 6 Vict. c. 38, s. 1.

[5] Larceny Act, 1916, s. 27 (2).

[6] *R.* v. *Evans* (1842), Car. & M. 298.

[7] 52 Geo. III. c. 155, s. 12; extended by 9 & 10 Vict. c. 59, s. 4.

[8] 23 & 24 Vict. c. 32, s. 2.

Obstructing a funeral and making blasphemous speeches at a burial service are also misdemeanours.[1]

Bigamy.

The law also punishes the profanation of the marriage ceremony on religious grounds, and also because such profanation is often a cloak for cruel deception.

Any person who, being lawfully married, goes through a marriage ceremony with any other person during the life of the husband or wife, "whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding seven years."[2] This offence is not triable at Quarter Sessions.

The crime of bigamy then is committed by the man or woman, who, being already married, in the lifetime of his wife or her husband goes through a marriage ceremony with another person in a form recognised as valid by the law of the land in which it takes place. The other party to the ceremony, if aware that the first party is committing bigamy, is a principal in the second degree, and therefore also guilty of bigamy and punishable to the same extent.[3]

Hence the prosecution must prove:—

(i.) That the accused validly married A.

(ii.) That the accused subsequently went through a marriage ceremony with B. in a form which was valid in the place where such ceremony was performed.

(iii.) That at the date of the second ceremony A. was alive.

"The wife or husband of a person charged with bigamy may be called as a witness either for the prosecution or defence and without the consent of the person charged."[4] So of course may the person with whom the person charged went through the bigamous form of marriage.

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[1] 43 & 44 Vict. c. 41, s. 7.

[2] 24 & 25 Vict. c. 100, s. 57.

[3] *R.* v. *Brawn and Webb* (1843), 1 C. & K. 144. Where the accused has been convicted of bigamy, the other party to the second ceremony may, if she or he had no knowledge of its invalidity, bring a civil action against the accused to recover damages for the tort of deceit, which he or she committed in pretending to be free to marry.

[4] Criminal Justice Administration Act, 1914 (4 & 5 Geo. V. c. 58), s. 28 (3).

(i.) The first marriage must be legally valid and binding.[1] Marriage within the forbidden degrees of affinity and consanguinity is prohibited not only by ecclesiastical law, but also by express statute.[2] Hence, if the first so-called marriage is with a person within the forbidden degrees, a marriage with a second person is not bigamous; *e.g.*, if a woman marries her deceased husband's brother, and during his life goes through a form of marriage with another man, she is not guilty of bigamy.[3]

(ii.) If the accused is a British subject, it is, as we have seen, immaterial whether the second marriage ceremony took place "in England or Ireland or elsewhere."[4] But if the accused be an alien, he can only be indicted here if the second ceremony took place in England or Ireland.[5] The essence of the offence is the desecration of the marriage ceremony. It is not necessary, therefore, that the second marriage should be one, which if not bigamous would be valid; *e.g.*, if a married woman were to go through a form of marriage with her husband's brother while her husband was still alive, she would commit bigamy.[6]

(iii.) The prosecution must also prove that at the date of the second ceremony the lawful husband or wife of the accused was alive. It is not necessary to go further and show that the accused knew this to be the case (except where the spouse has been continually absent for seven years, as in (a) below).

The accused may, of course, dispute any of the facts, the burden of proving which lies on the prosecution, *e.g.*, he may contend that the first marriage ceremony was for some reason invalid[1] or that he was not a party to it. But he usually relies on one or other of the three following defences :—

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[1] See the Marriage Acts, 1823 and 1837 (4 Geo. IV. c. 76, s. 21, and 6 & 7 Will. IV. c. 85, s. 39). A voidable marriage is binding unless it be avoided in the lifetime of both parties: see *post*, p. 1353.

[2] 5 & 6 Will. IV. c. 54.

[3] Marriage with a deceased wife's sister is now valid (7 Edw. VII. c. 47).

[4] *R.* v. *Earl Russell*, [1901] A. C. 446; and see *R.* v. *Audley*, [1907] 1 K. B. 383.

[5] 24 & 25 Vict. c. 100, s. 57.

[6] *R.* v. *Brawn and Webb* (1843), 1 C. & K. 144; *R.* v. *Allen* (1872), L. R. 1 C. C. R. 367.

(a) That the husband or wife of the person charged with bigamy has "been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."[2] If a man be absent from his home for seven years and nothing be heard of him, then at the end of the seven years the law presumes that he is dead ; and his wife may do so too ; she can therefore remarry with impunity. The burden of proving that the accused knew that his or her spouse was alive during the seven years lies on the prosecution.[3]

(b) It is also a good defence to a prosecution for bigamy for the accused to show that he or she, in good faith and on reasonable grounds, believed his or her spouse to be dead, even though seven years have not elapsed between the date at which he or she last knew his or her spouse to be alive and the date of the second marriage ceremony. There must be an honest belief that the husband or wife was dead, and this belief must be based on reasonable grounds.

This principle was established by the decision in *R.* v. *Tolson*,[4] in which case the facts were as follows :—

Mrs. Tolson was married on September 11, 1880. She was deserted by her husband on December 13, 1881. She and her father on inquiry learned from her husband's elder brother and from general report that he had gone down on a ship bound for America. On January 10, 1887, believing herself a widow, she married again ; and in December, 1887, Tolson reappeared. She was tried for bigamy and sentenced to one day's imprisonment. The Court for Crown Cases Reserved held that she was not guilty of bigamy, as there was no criminal intent on her part.

In both the cases (a) and (b), though the spouse who remarries is not guilty of any crime, the second marriage is invalid, as the first spouse was then still alive and undivorced, and the children of the second marriage are therefore illegitimate.

But though an honest error based on reasonable grounds as to a question of fact may afford the accused a defence, an error as to a point of law will not.

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[1] *R.* v. *Naguib*, [1917] 1 K. B. 359.
[2] 24 & 25 Vict. c. 100, s. 57.
[3] *R.* v. *Curgerwen* (1865), L. R. 1 C. C. R. 1.
[4] (1889), 23 Q. B. D. 168.

Thus A. and B. in the following cases are both guilty of bigamy :—

A. obtained a decree *nisi* for a divorce from his first wife, and honestly believing that that was all which the English law required, he remarried five days before the decree *nisi* was made absolute.

B., when only twenty years of age, married a girl of nineteen. He was advised by counsel (erroneously) that this marriage was invalid, as both parties were under age. He accordingly remarried.

(c) Lastly, the accused may show that the first marriage was dissolved by a decree of a competent Court. A Court is not recognised as competent, unless the husband's domicil is within the jurisdiction of that Court. A wife takes her husband's domicil, and can therefore, as a rule, obtain dissolution of her marriage only in the country in which he is domiciled.[1]

A man can only have his domicil in one country at a time. This country generally is the country in which he was born. He may, however, acquire a domicil in some other country by leaving the country of his birth and taking up his residence in such other country with the intention of permanently residing there; and if this is done honestly and not with a view to obtaining a divorce, a decree of divorce subsequently obtained in the country of his new domicil will be recognised in the country where he was born. A divorce obtained in another country by fraud or collusion would not be recognised in the English Courts. Thus, if a man and woman who were married in England genuinely acquire a foreign domicil not with a view to obtaining a divorce, and are subsequently divorced abroad according to the law of that foreign country, that divorce will be recognised as valid in England, even though it may have been granted for some cause which is not in England a ground for divorce.[2] Where, however, a domiciled Englishman, married in England, on legal advice went purposely to Scotland and lived there for a short time in order to obtain a divorce by

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[1] *Casdagli* v. *Casdagli*, [1919] A. C. 145. But this rule may be departed from in special circumstances; see *Stathatos* v. *Stathatos*, [1913] P. 46; *De Montaigu* v. *De Montaigu*, *ib.* 154; and *R.* v. *Hammersmith Registrar*, [1917] 1 K. B. 634.

[2] *E.g.*, in Hungary a husband can divorce his wife, if she absents herself from his house for two years without his consent.

Scotch law, it was held that in marrying again after obtaining such a divorce he committed bigamy.[1]

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[1] *R.* v. *Lolley* (1812), 2 Cl. & F. 567; and see *Shaw* v. *Gould* (1868), L. R. 3 H. L. 55; *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; *Le Mesurier* v. *Le Mesurier,* [1895] A. C. 517; *Bater* v. *Bater,* [1906] P. 209.

CHAPTER VIII.

OFFENCES AGAINST MORALITY AND PUBLIC DECENCY.

IT is not our intention in this work to describe in detail the most flagrant of the crimes which fall under this title. Rape and indecent assault are dealt with in a subsequent chapter.[1] We will allude here very briefly to crimes connected with sexual intercourse and to other immoral and indecent offences.

Abduction.

It is a misdemeanour punishable with imprisonment for two years with or without hard labour for any one to take, or cause to be taken, an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.[2]

It is no defence that the girl was a consenting party to the abduction,[3] or that she was really the proposer of the scheme.[4] But if she left her home without persuasion or assistance of any kind from the defendant, he cannot be convicted of abduction merely because he received her into his house and refused to restore her.[5]

The motives of the accused are, under this section, wholly immaterial.[6] The fact that they were of the best possible kind will afford him no defence. It is not merely a seducer, who is punishable for this offence; any person, who takes the girl from her home for purposes which are inconsistent with the exercise of the control of her proper guardian, can be convicted under this section.

If the accused at the time he took the girl away did not know, and had no reason to know, that she was under the lawful care or charge of such parent or guardian, he cannot be convicted.[1] But the fact that the accused honestly and on reasonable grounds believed the girl to be over the age of sixteen will afford him no defence, if as a matter of fact she be under that age.[2] In all these cases the age of the girl must be strictly proved—that is, by the production of the certificate of her birth and by clear evidence of her identity with the person named in the certificate.[3]

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[1] Part III., Chap. VII., *post*, p. 326.
[2] Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 55.
[3] *R.* v. *Mankletow* (1853), Dearsl. 159.
[4] *R.* v. *Robins* (1844), 1 C. & K. 456.
[5] *R.* v. *Olifier* (1866), 10 Cox, 402.
[6] *R.* v. *Booth* (1872), 12 Cox, 231.

It is a misdemeanour punishable with imprisonment for two years with or without hard labour for any one to take, or cause to be taken, an unmarried girl under the age of eighteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent that she should be carnally known by any man.[4]

It is a defence to this charge if the accused can show that at the time of taking the girl out of lawful custody he had reasonable cause to believe that she was of or above the age of eighteen.[5] It is also a defence if it be shown that the girl left her parents of her own accord without any solicitation from the accused. But proof that it was owing to his inducements that she left them is sufficient to convict him, provided there be evidence of the intent required by the section.[6]

It is felony punishable with fourteen years' penal servitude for any one from motives of lucre to take away or detain against her will a woman of any age entitled to property, with intent to marry and carnally know her or to cause her to be married or carnally known by another; or to fraudulently allure, take away or detain an heiress under the age of twenty-one, against the will of her guardians, with the same intent;[7] or by force to take away or detain against her will any woman of any age with the same intent.[8]

The words of the statute are "shall have any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or shall be a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest." The defendant, if convicted, is incapable of taking any interest in the woman's property, real or personal, and if a marriage has taken place the property will, on the conviction of the prisoner, be settled as a judge of the Chancery Division thinks best.[1]

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[1] *R.* v. *Hibbert* (1869), L. R. 1 C. C. R. 184.
[2] *R.* v. *Prince* (1875), L. R. 2 C. C. R. 154, *ante*, p. 118.
[3] *R.* v. *Rogers* (1914), 24 Cox, 465.
[4] Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 7.
[5] *Ib.; R.* v. *Packer* (1886), 16 Cox, 57.
[6] *R.* v. *Miller* (1876), 13 Cox, 179 ; *R.* v. *Henkers* (1886), 16 Cox, 257.
[7] 24 & 25 Vict. c. 100, s. 53.
[8] *Ib.* s. 54.

Procuration.

The Criminal Law Amendment Act, 1885,[2] also makes various acts of procuration of women and girls misdemeanours punishable with imprisonment for two years, with or without hard labour. Thus it is an offence to procure or attempt to procure any female under twenty-one, who is not a common prostitute, (a) to have carnal connection with any person, or (b) to become a common prostitute, or (c) to leave the United Kingdom with the intent that she may become an inmate of or frequent a brothel elsewhere, or (d) to leave her usual place of abode in the United Kingdom with the intent that she may become an inmate of or frequent a brothel within or without the King's dominions.[3] Any male person convicted of any of these offences may, in addition to the punishment mentioned above, be sentenced to be once privately whipped.[4] Again, by section 3, it is an offence to procure or attempt to procure by threats or intimidation any female to have unlawful carnal connection, or by false representations to procure or attempt to procure any female, not being a common prostitute, to have unlawful carnal connection, or to administer any stupefying drug to any female with intent thereby to enable any person to have carnal connection with her. But no person accused of any of the above offences can be convicted upon the evidence of one witness only, unless there is material corroboration of that evidence. Section 8 of the Act makes it a misdemeanour to detain any female against her will on any premises or in any brothel with intent that she may be carnally known by any man.

The Children Act, 1908,[5] contains several provisions for the better protection of young girls exposed to the risk of seduction or procuration. Under that Act it is a misdemeanour punishable by imprisonment for two years for any person who has the custody, charge or care of a girl under sixteen to cause or encourage the seduction, or prostitution, or unlawful carnal knowledge, of such girl. Knowingly to allow the girl to consort with, or be in the employment of, any prostitute or person of known immoral character is a sufficient "causing or encouraging" to render a person liable to conviction, if the girl has in fact been seduced, or become a prostitute, or been unlawfully carnally known. Further any person, who has the custody of a girl under sixteen and who knows that she is exposed to the risk of seduction or prostitution, or of being unlawfully carnally known, may be bound over to exercise due care and supervision over her.[1]

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[1] 24 & 25 Vict. c. 100, s. 53.
[2] 48 & 49 Vict. c. 69.
[3] S. 2 as amended by 2 & 3 Geo. V. c. 20, s. 2.
[4] 2 & 3 Geo. V. c. 20, s. 3.
[5] 8 Edw. VII. c. 67.

To steal children under fourteen is a felony punishable with seven years' penal servitude; but no one can be convicted of this crime who took the child under a claim of right.[2]

Brothels.

Keeping a brothel is an indictable misdemeanour at common law punishable with fine and imprisonment. Any person, whether resident in or a ratepayer of a parish or not, may prosecute, even though he has suffered no personal annoyance or injury therefrom.

The Disorderly Houses Act, 1751,[3] facilitated prosecutions for this offence. By section 5 of that Act any two inhabitants of a parish, paying scot and lot therein, may give notice in writing to a constable or other peace officer of the parish of any person who keeps a brothel.[4] The officer, on receiving such notice, must go with the two inhabitants before a justice of the peace, and on their swearing before him that they believe the contents of such notice to be true, and entering into a recognizance to give evidence against the accused, the officer must enter into a recognizance to prosecute. He may recover the cost of such prosecution from the poor-rate, and if the accused be convicted, the inhabitants who gave notice are entitled to receive £10 each from the same fund.

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[1] 8 Edw. VII. c. 67, ss. 17, 18, as amended by 10 Edw. VII. & 1 Geo. V. c. 25, s. 1; and see *R.* v. *Moon*, [1910] 1 K. B. 818; *R.* v. *Chainey*, [1914] 1 K. B. 137.

[2] 24 & 25 Vict. c. 100, s. 56; and see *R.* v. *Duguid* (1906), 94 L. T. 887.

[3] 25 Geo. II. c. 36, made perpetual by 28 Geo. II. c. 19, s. 1.

[4] Inhabitants paying scot and lot are now equivalent to inhabitant ratepayers, and the constable to a member of the police force of the district, or the parish constable, if any, appointed under 35 & 36 Vict. c. 92, s. 7.

By the Criminal Law Amendment Act, 1885,[1] every person commits an offence punishable on summary conviction by fine or imprisonment who keeps or manages or acts or assists in the management of a brothel; or who, being the tenant, lessee, occupier or person in charge of any premises, knowingly permits such premises or any part thereof to be used as a brothel; or who, being the lessor or landlord of any premises, or the agent of such lessor or landlord, lets the same or any part thereof with the knowledge that they are to be used as a brothel.

In order to be a brothel it is not essential that any indecency or disorder should be visible from the outside,[2] but the premises must be used as a brothel and not merely as the residence of a single prostitute.[3] The fact that the defendant "acted or behaved as master or mistress, or as the person having the care, government or management of the house, is sufficient evidence that he or she kept" the brothel.

Upon the conviction of a tenant for permitting the demised premises to be used as a brothel, his landlord can require him to assign the lease of the premises to a third person, to be approved by the landlord; if the tenant does not do so within three months, the lease will be forfeited. And if after the conviction has been brought to his notice the landlord fails to exercise this right and the place is again used as a brothel, the landlord may be convicted of aiding and abetting the offence.[4] Again, by the Licensing (Consolidation) Act, 1910,[5] a licensed person, who permits his premises to be used as a brothel, is liable to a penalty of £20 and at once forfeits his licence,[6] and is disqualified for ever from holding any licence for the sale of intoxicating liquors.

Abortion.

It is a felony punishable with penal servitude for life for any woman, being with child, to unlawfully administer to herself any poison or other noxious thing or to unlawfully use any instrument or other means with intent to procure her own miscarriage.[1] And any one, who unlawfully administers to a woman or causes her to take any poison or other noxious thing or unlawfully uses upon her any instrument or other means with intent to procure her miscarriage, is guilty of felony, whether the woman be with child or not, and is liable to the same punishment.[2]

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[1] 48 & 49 Vict. c. 69, s. 13, as amended by 2 & 3 Geo. V. c. 20, s. 4 (1).

[2] *R.* v. *Rice* (1866), L. R. 1 C. C. R. 21.

[3] *Singleton* v. *Ellison,* [1895] 1 Q. B. 607; and see *Durose* v. *Wilson* (1907), 96 L. T. 645.

[4] 2 & 3 Geo. V. c. 20, s. 5.

[5] 10 Edw. VII. & 1 Geo. V. c. 24, s. 77.

[6] *R.* v. *West Riding Justices* (1888), 21 Q. B. D. 258.

Where the drug administered is a recognised poison, it is a "noxious thing," even though the quantity administered was so small as to be incapable of doing any harm. But where the drug is not a recognised poison, or is not harmful when taken in small quantities, nevertheless if the accused administered it in such large quantities as to be capable of doing harm, he has administered a "noxious thing" within the meaning of the statute.[3] It has been decided that if the accused takes a harmless drug under the belief that it is "noxious" and with intent to procure her miscarriage, she can be convicted of attempting to procure abortion.[4]

Moreover any one, who supplies or procures any poison or other noxious thing or any instrument or other thing, knowing that the same is intended to be unlawfully used with intent to procure the miscarriage of a woman, is guilty of a misdemeanour punishable with five years' penal servitude.[5] The fact that the woman was not with child is wholly immaterial.

Indecent Exposure.

Any person, who exposes in public his naked person, commits a misdemeanour indictable at common law and is liable to two years' imprisonment; the offence, however, is usually dealt with under the Vagrancy Act, 1824.[6]

Thus, bathing in the state of nature near to inhabited houses or near to a public footpath would be an indictable misdemeanour at common law.[7] It is no defence that from time immemorial men have been accustomed to bathe from that particular place, or that there has been no exposure beyond what is necessarily incidental to such bathing.[1]

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[1] 24 & 25 Vict. c. 100, s. 58.

[2] *Ib.* ss. 58 and 59. The woman may in such a case be indicted for conspiracy with such persons to procure abortion: *R.* v. *Whitchurch and others* (1890), 24 Q. B. D. 420.

[3] *R.* v. *Cramp* (1880), 5 Q. B. D. 307; *Bickley* v. *R.* (1909), 2 Cr. App. Rep. 53.

[4] *R.* v. *Brown* (1899), 63 J. P. 790.

[5] 24 & 25 Vict. c. 100, s. 59.

[6] 5 Geo. V. c. 83; see *post*, p. 231.

[7] *R.* v. *Sedley* (1663), 17 St. Tr. 155; *R.* v. *Reed* (1871), 12 Cox, 1.

It is also an offence punishable summarily by imprisonment for three months to expose the person in any street, road or public highway, or in view thereof, or in any place of public resort, with intent to insult any female.[2]

It is not necessary that the indecent exposure should occur in a place either belonging to the people or dedicated to public use; it is enough if it be a place to which the public generally are admitted. Thus a man could be convicted of indecent exposure in a theatre if it were shown that a number of persons saw, or might have seen, what took place. The expression "an open and public place" in any of the Vagrancy Acts includes "any place of public resort or recreation ground belonging to, or under the control of, the local authority, and any unfenced ground joining or abutting upon any street in an urban district."[3]

Unnatural Offences.

Any man or woman, who commits an unnatural offence with any animal or human being, is guilty of felony and liable to be sent to penal servitude for life.[4] An attempt to commit any such offence is a misdemeanour punishable by penal servitude to the extent of ten years.[5] It is no defence to an indictment for sodomy or attempted sodomy that the person on whom it was perpetrated was a consenting party. The law holds all persons, whether actively or passively concerned, equally guilty as principals of the offence committed, unless one of them be under the age of fourteen years.[6]

It is a misdemeanour punishable with penal servitude for ten years to assault another with intent to commit an unnatural offence, or to make any indecent assault on a male person.[7] Where the person indecently assaulted is under the age of thirteen, it is no defence to an indictment that he consented to the assault.[8]

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[1] *R.* v. *Crunden* (1809), 2 Camp. 89; and see 41 Vict. c. 14, s. 11.

[2] 5 Geo. IV. c. 83, s. 4.

[3] Public Health Acts Amendment Act, 1907 (7 Edw. VII. c. 53), s. 81.

[4] 24 & 25 Vict. c. 100, s. 61.

[5] *Ib.* s. 62. A person indicted for the full offence can be convicted of the attempt (14 & 15 Vict. c. 100, s. 9).

[6] 1 Hale, 670; 3 Co. Inst. 59; *R.* v. *Allen* (1848), 3 Cox, 270.

[7] 24 & 25 Vict. c. 100, s. 62.

[8] 43 & 44 Vict. c. 45, s. 2.

By the Criminal Law Amendment Act, 1885,[1] it is a misdemeanour punishable by imprisonment for two years for a male person either in public or private to commit, or to be a party to the commission of, or to procure or attempt to procure the commission by any male person of, any act of gross indecency with another male person.

By the Punishment of Incest Act, 1908,[2] any male, who has carnal knowledge of his granddaughter, daughter, sister or mother either with or without her consent, is guilty of a misdemeanour punishable with penal servitude for seven years. It is also a misdemeanour punishable with two years' imprisonment for any male to attempt to commit such offence.[3] Any female over sixteen, who "with consent permits" such intercourse with her grandfather, father, brother or son, is also guilty of a misdemeanour and liable to the same punishment.[4] These offences are within the Vexatious Indictments Act, 1859.[5] No prosecution can be commenced, except by the Director of Public Prosecutions, without the leave of the Attorney-General.

None of the above offences, except those under section 62 of 24 & 25 Vict. c. 100,[6] are triable at Quarter Sessions.

Obscene Publications.

It is a misdemeanour punishable on indictment or information to publish obscene and immoral books and pictures. Such an act is destructive of the public morality though it may not reflect on any particular person, and as such it is punishable at common law.[7]

Similarly it is a crime to speak vicious and immoral words, provided they be uttered publicly in the hearing of many persons; otherwise there is no detriment to the general public.

These offences can be tried at Quarter Sessions. The punishment may be either fine or imprisonment for a term of any length, and either with or without hard labour.[1] It is no longer necessary to set out in the indictment the obscene passages in full. It is "sufficient to deposit the book, newspaper or other documents containing the alleged libel with the indictment, or other judicial proceedings, together with particulars showing precisely, by reference to pages, columns and lines, in what part of the book, newspaper or other document, the alleged libel is to be found, and such particulars shall be deemed to form part of the record."[2]

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[1] 48 & 49 Vict. c. 69, s. 11.

[2] 8 Edw. VII. c. 45.

[3] *Ib.* s. 1.

[4] *Ib.* s. 2.

[5] 22 & 23 Vict. c. 17. See *post*, pp. 1121, 1122.

[6] See notes 5 and 7 on p. 226.

[7] *R.* v. *Curl* (1727), 2 Str. 788.

The test of obscenity is this: "Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[3]

By 20 & 21 Vict. c. 83, s. 1, if any one reasonably believes that any obscene books or pictures are kept in any place for the purpose of being sold or exhibited for gain, he may make a complaint on oath before the police magistrate, stipendiary magistrate or any two justices, having jurisdiction over such place. The magistrate or justices must be satisfied:—

(i.) That such belief is well founded: and for that purpose the complainant must also state on oath that at least one such book or picture has in fact been sold or exhibited for gain in such place.

(ii.) That such book or picture is so obscene that its publication would be a misdemeanour.

(iii.) That such publication would be a misdemeanour proper to be prosecuted as such.

Thereupon the magistrate or justices issue a special warrant authorising their officer to search for and seize all such books and pictures, and bring them into Court; and then a summons is issued calling upon the occupier of the place to appear and show cause why such books and pictures should not be destroyed. Either the owner, or any other person claiming to be the owner, of such books and pictures may appear; but if no one appears, or if in spite of appearance the justices are still satisfied that the books and pictures or any of them are of such a character that their publication would be a misdemeanour proper to be prosecuted, they must order them to be destroyed; if not so satisfied, they must order them to be restored to the occupier of the place in which they were seized.

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[1] 14 & 15 Vict. c. 100, s. 29.

[2] Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 7. See indictment, No. 22, in the Appendix.

[3] *Per* Cockburn, C. J., in *R.* v. *Hicklin* (1868), L. R. 3 Q. B. at p. 371.

Any person aggrieved by the determination of the justices may appeal to Quarter Sessions by giving notice in writing of such appeal, and of the grounds thereof, and entering into a recognizance, within seven days after such determination. Hence the books and pictures ordered to be destroyed will be impounded only for such seven days; on the eighth day, if no notice of appeal has been given, they will be destroyed. If the appeal be dismissed, or not prosecuted, the Court of Quarter Sessions may order the books and pictures to be destroyed.

If the work be in itself obscene, its publication is an indictable misdemeanour, and the work may be seized under this Act, however innocent may be the motive of the publisher.[1] That the libel is an accurate report of a judicial proceeding is no defence, if it contain matter of an obscene and demoralising character.[2] The death of the complainant after the issuing of the summons will not cause the proceedings to lapse.[3]

Any one, who openly exposes or exhibits any indecent exhibition or obscene prints or pictures in any street, road, public place or highway, or in any window or other part of any house situate in any street, road, public place or highway, shall be deemed a rogue and vagabond, and punished on summary conviction.[4]

It is a misdemeanour under section 63 of the Post Office Act, 1908,[5] for any one to send or attempt to send through the post a postal packet enclosing any indecent or obscene print, photograph, book, &c., or any indecent or obscene article. The offender, if convicted on indictment, may be sentenced to one year's imprisonment with hard labour: if convicted summarily, to a fine not exceeding £10. The editor of a paper, who knowingly published advertisements which, though not obscene in themselves, stated where obscene books and photographs could be obtained, was held, on proof that obscene books and photographs had in fact been obtained through the post by means of such advertisements, to have been rightly convicted of aiding and abetting others to commit this offence.[1] The Postmaster-General has power to prevent the delivery by post of any obscene or indecent prints, photographs or books.[2]

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[1] See the judgment of Cockburn, C. J., in *R.* v. *Hicklin* (1868), L. R. 3 Q. B. at p. 371.

[2] *Steele* v. *Brannan* (1872), L. R. 7 C. P. 261.

[3] *R.* v. *Truelove* (1880), 5 Q. B. D. 336.

[4] 5 Geo. IV. c. 83, s. 4, as explained by 1 & 2 Vict. c. 38, s. 2.

[5] 8 Edw. VII. c. 48.

By section 3 of the Indecent Advertisements Act, 1889,[3] "Whoever affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, post, board, tree or any other thing whatsoever, so as to be visible to a person being in or passing along any street, public highway or footpath, and whoever affixes to or inscribes on any public urinal, or delivers or attempts to deliver, or exhibits, to any inhabitant or to any person being in or passing along any street, public highway or footpath, or throws down the area of any house, or exhibits to public view in the window of any house or shop, any picture or printed or written matter which is of an indecent or obscene nature, shall, on summary conviction in manner provided by the Summary Jurisdiction Acts, be liable to a penalty not exceeding forty shillings, or, in the discretion of the Court, to imprisonment for any term not exceeding one month, with or without hard labour." Section 6 provides that "any constable or other peace officer may arrest without warrant any person whom he shall find committing any offence against this Act."

Habitual Drunkenness.

An "habitual drunkard" is "a person who not being amenable to any jurisdiction in lunacy is notwithstanding by reason of habitual intemperate drinking of intoxicating liquor at times dangerous to himself or to others, or incapable of managing himself and his affairs."[4] The Inebriates Act, 1898,[5] makes provision for detention of such persons in certified reformatories.

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[1] *R.* v. *De Marny,* [1907] 1 K. B. 388.
[2] 8 Edw. VII. c. 48, s. 16.
[3] 52 & 53 Vict. c. 18.
[4] 42 & 43 Vict. c. 19, s. 3.
[5] 61 & 62 Vict. c. 60, ss. 1, 2.

But the jury have to find specifically that the prisoner is an habitual drunkard. The prosecution must prove at least three convictions for drunkenness within the twelve months preceding the date of the offence upon which the prisoner is being tried, and also that in consequence of intemperance he is at times dangerous to himself, his children or to others, and incapable of managing his affairs.

Where either a married man or woman is an habitual drunkard within the above definition, the wife or husband can obtain a separation order from a Court of summary jurisdiction.[1]

The Vagrancy Acts.

Many offences against morality and public decency in our streets and public places are dealt with by the Vagrancy Acts, 1824—1898.[2]

Under these Acts persons committing certain offences may be deemed to be :—

(i.) "Idle and disorderly persons;"

(ii.) "Rogues and vagabonds;" or

(iii.) "Incorrigible rogues."

(i.) "Idle and disorderly persons" are[3] :—

(a) Persons who, though able to maintain themselves and families, wilfully refuse or neglect to do so, and become chargeable to the parish or township.

(b) Petty chapmen or pedlars wandering abroad or trading without being licensed or authorised by law.

(c) Common prostitutes found wandering in the streets or in places of public resort and behaving in a riotous or indecent manner.

(d) Beggars in public places, or those who encourage children to beg.

Such persons are liable to one month's hard labour on conviction as "idle and disorderly persons," or to a fine not exceeding £5.[4]

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[1] 2 Edw. VII. c. 28, s. 5.

[2] 5 Geo. IV. c. 83; 1 & 2 Vict. c. 38; 28 & 29 Vict. c. 79; 36 & 37 Vict. c. 38; 61 & 62 Vict. c. 39.

[3] 5 Geo. IV. c. 83, s. 3.

[4] Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4.

(ii.) Under "rogues and vagabonds" are included[1]:—

(a) Every person, who commits any of the above offences, after having been previously convicted as "an idle and disorderly person."

(b) Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise to deceive or impose on any of His Majesty's subjects. Palmistry is now a fashionable amusement; it is even alleged to be a science. But if it be practised with intent to deceive any one—whether scientifically or not, whether for gain or not—it is criminal in England.[2]

(c) Persons wandering abroad and lodging in barns, outhouses or deserted buildings without visible means of subsistence, and unable to give a good account of themselves.

(d) Persons wilfully exposing to view obscene prints, pictures or other indecent exhibitions in streets, public places, or in the window or any other part of any shop.[3]

(e) Persons wilfully and obscenely exposing their persons openly with intent to insult any female.

(f) Persons wandering and endeavouring to obtain alms by exposure of wounds or deformities.

(g) Persons going about gathering alms or charitable contributions under any false or fraudulent pretence.

(h) Any person running away and leaving his wife or his or her children chargeable to the parish.

(i) Persons in possession of any picklock, keys or other implements with intent to break into dwelling-houses or buildings, or being armed with a gun or offensive weapon with intent to commit a felonious act.

(j) Persons found in any dwelling-house or enclosed premises for an unlawful purpose.

(k) Suspected persons or reputed thieves frequenting or loitering on river, canal, dock, quay, warehouse or any street or place adjacent to a highway with intent to commit a felony.

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[1] 5 Geo. IV. c. 83, s. 4.

[2] *Penny* v. *Hanson* (1887), 18 Q. B. D. 478; *R.* v. *Entwistle*, [1899] 1 Q. B. 846 but see *R.* v. *Bloodwort* (1919), 64 Sol. Jo. 3, 11. The statute 9 Geo. II. c. 5 put a stop to all prosecutions for witchcraft and sorcery in England.

[3] And see the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18), s. 3.

It is expressly provided that, when any one is arrested as a suspected person or a reputed thief for frequenting or loitering with intent to commit felony, it is not necessary to show that he was guilty of any particular act tending to show what his purpose or intention was; he may be convicted as a rogue and vagabond if, from the circumstances of the case and from his known character as proved to the Court, it appears that his intent was to commit a felony.[1]

(l) Persons who, when apprehended as "idle and disorderly persons," violently resist a police officer. In all such cases, where a conviction as "idle and disorderly persons" follows the apprehension, the prisoners may be dealt with as "rogues and vagabonds."

(m) Expelled or deported aliens found in the United Kingdom.[2]

All the above are liable on conviction as rogues and vagabonds to six months' imprisonment with hard labour, and cannot demand trial by a jury.[3]

(iii.) "Incorrigible rogues" are[4]:—

(a) All persons previously convicted as "a rogue and vagabond" under this Act.

(b) All persons breaking or escaping out of legal confinement before the expiration of their terms of confinement under this Act.

(c) All persons apprehended and convicted as "rogues and vagabonds," who on apprehension violently resist any police officer.

Such an offender, after being convicted at the Petty Sessions as an incorrigible rogue,[5] can be sent to prison with hard labour till the next General or Quarter Sessions, where he may be sentenced to further imprisonment with hard labour for one year, and if deemed expedient, be also punished by whipping.

A justice may order that any money found on such persons or the proceeds of any sale of their effects shall be applied towards the expenses of apprehension and of maintenance during detention.[6]

On information on oath that any person is an idle and disorderly person or a rogue and vagabond, or an incorrigible rogue, and is reasonably suspected to be harboured or concealed in any house kept for lodging or reception of travellers, a justice may grant a warrant to enter such house at any time and search for and arrest any such person as above found therein.[1]

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[1] Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 15.
[2] 5 Edw. VII. c. 13, ss. 1 (5), 3 (2), 7 (1).
[3] *R.* v. *Dickinson*, [1917] 2 K. B. 393.
[4] 5 Geo. IV. c. 83, s. 5.
[5] *R.* v. *Evans*, [1915] 2 K. B. 762.
[6] 5 Geo. IV. c. 83, s. 8.

Under the Vagrancy Act, 1898,[2] "Every male person, who

(a) knowingly lives wholly or in part on the earnings of prostitution, or

(b) in any public place persistently solicits or importunes for immoral purposes,

shall be deemed a 'rogue and vagabond' within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly," or he may be indicted for this offence and sentenced to imprisonment with hard labour for two years; and on a second conviction he may also be ordered to be whipped.[3]

It is open to anyone to swear an information that there is reason to suspect that a house or a part of a house is being used by a woman for the purpose of prostitution, and that a man residing in or frequenting the house is living wholly or in part on the earnings of the woman. In such a case, the magistrate, before whom the information is laid, may issue a warrant authorising any constable to enter and search the house, and to arrest the man.

Where a man is proved to live with or to be habitually in the company of a prostitute, or is proved to have such control over the prostitute as to show that he is aiding or compelling her prostitution, he will be deemed to be "knowingly living on the earnings of prostitution," unless he can prove to the satisfaction of the Court that he is not.[4]

Cruelty to Animals.

Cruelty to animals is also an offence against morality. The law relating to it will be found in the Protection of Animals Act, 1911,[5] which has repealed many former Acts upon the subject.

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[1] 5 Geo. IV. c. 83, s. 13.

[2] 61 & 62 Vict. c. 39, s. 1 (1).

[3] 2 & 3 Geo. V. c. 20, s. 7 (5).

[4] 61 & 62 Vict. c. 39, s. 1 (3), as amended by 2 & 3 Geo. V. c. 20, s. 7 (1).

[5] 1 & 2 Geo. V. c. 27.

A century ago the law extended no protection to the dumb creation; "an animal had no rights." Bear-baiting and cock-fighting were perfectly legal, though prize-fighting was always, in the view of the law, illegal—a rule which was inoperative in practice. And acts of scandalous cruelty were constantly practised on animals of all kinds. In 1822 was passed the first measure restraining cruelty to cattle and beasts of burden—a measure due to the direct advocacy of Jeremy Bentham.[1] In 1833 bear-baiting and cock-fighting were prohibited within five miles of Temple Bar—not, be it observed, out of any pity for those animals, but because such sports collected crowds of noisy and riotous persons, which interfered with the comfort of orderly citizens.[2] So to set animals to fight in any thoroughfare or public place within the metropolis was in 1839 declared to be a public nuisance and made punishable with a fine.[3] In 1835 it was enacted that whoever put an animal in the pound must supply it with food; he must not leave it there to starve.[4] In 1849 was passed a general Act for the Prevention of Cruelty to Animals.[5] It extended the Act of 1822 to all tame animals;[6] it also dealt with slaughterhouses, and insisted on more merciful methods of slaughtering animals.[7] It was in its turn extended and amended by the Cruelty to Animals Act, 1854;[8] and both these Acts are now repealed by the Act of 1911.

It was not until 1900 that any protection was afforded to wild animals in captivity, such as rabbits in a hutch or lions in a menagerie. It was held in two cases[9] that neither the Act of 1849 nor that of 1854 protected wild animals in captivity. Hence it was necessary to pass in 1900 an Act[10] which made it an offence punishable with fine or imprisonment for any person wantonly or unreasonably to cause unnecessary suffering to any animal that is confined, maimed or pinioned, or to cruelly abuse, infuriate, tease or terrify it.

The following are the main provisions of the Protection of Animals Act, 1911, which applies to captive as well as to domestic animals.[11]

By section 1 any person, who

(*a*) shall cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate or terrify any animal, or shall cause or procure any animal to be so used, or shall wantonly or unreasonably do any act which causes unnecessary suffering to any animal; or

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[1] 3 Geo. IV. c. 71.
[2] 3 & 4 Will. IV. c. 19, s. 29.
[3] 2 & 3 Vict. c. 47, s. 54 (2).
[4] 5 & 6 Will. IV. c. 59.
[5] 12 & 13 Vict. c. 92.
[6] S. 29; and see 17 & 18 Vict. c. 60, s. 3.
[7] Ss. 7—12.
[8] 17 & 18 Vict. c. 60.
[9] *Aplin* v. *Porritt*, [1893] 2 Q. B. 57; *Harper* v. *Marcks*, [1894] 2 Q. B. 319.
[10] Wild Animals in Captivity Protection Act (63 & 64 Vict. c. 33), now repealed by the Act of 1911.
[11] 1 & 2 Geo. V. c, 27, s. 15.

(*b*) shall convey or carry any animal in such manner or position as to cause that animal any unnecessary suffering; or

(*c*) shall cause, procure or assist at the fighting or baiting of any animal, or shall keep, use or manage any premises for the purpose of fighting or baiting any animal; or

(*d*) shall wilfully, without any reasonable cause or excuse, administer, or cause to be administered, any poisonous or injurious drug or substance to any animal; or

(*e*) shall subject, or cause or procure to be subjected, any animal to any operation which is performed without due care and humanity;

shall be guilty of an offence of cruelty within the meaning of this Act, and shall be liable upon summary conviction to a fine not exceeding twenty-five pounds, or alternatively, or in addition thereto, to be imprisoned, with or without hard labour, for any term not exceeding six months.

The owner of any animal so ill-treated—although he has not himself been guilty of any cruelty—can be convicted under the above section if he has permitted any such act of cruelty or not taken reasonable care to protect the animal therefrom, but in the latter case he can only be fined.

Where the owner of an animal is convicted of an offence of cruelty, the Court can order the animal to be destroyed without his consent if the Court is satisfied that it would be cruel to keep it alive; or the Court may deprive him of the ownership of the animal and make any order they think fit as to the disposal of the animal.[1]

The hunting or coursing of any animal in the way of sport and the slaughter of an animal for human food are not within the Act if there be no unnecessary cruelty.[2] Regulations as to the management of knackers' yards and slaughterhouses are contained in sections 5 and 6 and in the first Schedule to the Act.

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[1] Ss. 2 and 3.

[2] S. 1 (3).

Section 7 requires any one who impounds an animal to "supply it with a sufficient quantity of wholesome and suitable food and water."

Section 9 prohibits the use of dogs as draught animals, and imposes a maximum penalty of 40*s*. for the first offence and of £5 for any subsequent offence.

If a policeman finds an animal which is so diseased or so severely injured that it would be cruel to keep it alive, it is his duty under section 11 of this Act to take steps to have it put to death in such manner as to inflict as little suffering as practicable.

Sea birds and their eggs are protected by the Wild Birds Protection Acts, 1880 to 1908.[1]

Grave doubts existed as to the morality of permitting dissection of living animals; but it was urged that such operations were necessary for the advancement of science and that much benefit to the human race had accrued from such researches when properly conducted by medical men of skill and learning. Hence the Legislature, while forbidding vivisection in general,[2] permits it only under the following conditions:—

(i.) The person performing the experiments must hold a licence from the Home Office, and in some cases the place used for the experiments must be registered.

(ii.) The experiments must be performed with the object of advancing knowledge, which will be useful for saving or prolonging life, or for alleviating suffering, and not for the purpose of attaining manual skill, nor as illustrations to accompany lectures, unless it is certified that the illustrations are absolutely necessary for due instruction.

(iii.) The animal must, during the whole of the experiment, be under the influence of some anæsthetic, sufficiently strong to prevent it from feeling pain. In some cases the animal must be killed before recovering consciousness.[1]

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[1] See the 43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51; 57 & 58 Vict. c. 24; 59 & 60 Vict. c. 56; 2 Edw. VII. c. 6; 4 Edw. VII. cc. 4 and 10; 8 Edw. VII. c. 11. See *Hollis* v. *Young*, [1909] 1 K. B. 629.

[2] Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77), ss. 1, 22.

Experiments, which are necessary for some criminal proceedings, may be performed under a written order of a judge of the High Court.[2]

Moreover any person, who subjects an animal, or being the owner of it permits it to be subjected, to an operation which is conducted contrary to the regulations in force, commits an offence against the Animals (Anæsthetics) Act, 1919.[3]

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[1] *Ib.* ss. 2, 3.

[2] *Ib.* s. 12.

[3] 9 & 10 Geo. V. c. 54.

CHAPTER IX.

NUISANCE.

ANY unlawful act, which without any direct physical contact or interference endangers the lives, safety, health, comfort or property of any portion of the public, outrages public decency, or obstructs the public exercise or enjoyment of any right common to all His Majesty's subjects, is a common or public nuisance. So is any omission to discharge a legal duty which produces the like results.[1]

Any one who commits a public nuisance is guilty of a misdemeanour at common law, for which he may be tried on indictment or criminal information. If convicted he may be sentenced to imprisonment for two years without hard labour, or the Court may impose such fine as it deems suitable, and may also as part of its judgment order the nuisance to be abated.[2] Sentence is frequently suspended in order to give the defendant an opportunity of abating the nuisance. When the nuisance has been satisfactorily abated, either before or after verdict, a nominal fine, with or without costs, is often considered sufficient. But where the nuisance has been continued and has caused serious injury, a heavy penalty may be imposed. The offence is triable at Quarter Sessions.

Statutes have at different times been passed containing provisions which impose severer punishment on certain kinds of public nuisance.

It is necessary in the first place to distinguish between a public and a private nuisance.

Any act, which without any direct physical interference materially impairs the use and enjoyment by another of his property, or prejudicially affects his health, comfort or convenience, is a nuisance. If a nuisance affects the property or the health, comfort or convenience of the general public, or of all persons who happen to come within its operation, it is a public nuisance, although it may affect some persons more than others. If, however, it affects the health, comfort or convenience of only one or two persons, it is a private nuisance.

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[1] The instance which occurs most frequently in practice, of a public nuisance caused by the defendant's omission to perform a legal duty, is the non-repair of a highway, which is dealt with *post*, pp. 249, 250.

[2] 1 Hawk. P. C., c. 32, 4. Nuisances, s. 14.

Thus where volumes of noxious smoke are emitted from a factory, a public nuisance is committed, although those persons, who are nearer to the factory in question and therefore suffer special inconvenience, might press for its abatement as a private nuisance. So the stopping of the King's highway is a nuisance to all who may have occasion to travel upon that highway; it may be a much greater nuisance to a person who has to travel along it every day than it is to an individual who has to travel along it only once a year; but as it is more or less a nuisance to every one who has occasion to use it, it is a public nuisance.

A private nuisance affords ground only for an action of tort, in which the person aggrieved may claim damages or an injunction or both.[1] He can also in certain cases himself abate the nuisance without commencing legal proceedings; this cannot be done in the case of a nuisance that is exclusively a public one.[2]

A public nuisance, on the other hand, may give rise to proceedings of three different kinds:—

(i.) It may, as we have seen, be ground for an indictment or criminal information. Any person may put the criminal law in motion against an alleged offender, and may therefore present an indictment against those whom he charges with causing a nuisance. A criminal information, however, must be sanctioned by, and brought in the name of, the Attorney-General.

(ii.) It may be ground for a civil action, brought in the name of the Attorney-General, in the Chancery Division, which is also called an information. This may be instituted by the Attorney-General of his own motion; but more usually it is initiated by some person aggrieved, called "the relator," who must obtain the sanction of the Attorney-General before he issues his writ. If the Attorney-General is simply proceeding on behalf of the public, the result of a successful information is an injunction to restrain the continuance of the nuisance.[1] But the relator, if there is one, can in some cases also obtain damages. No injunction will be granted if the nuisance was abated before the hearing of the action.[2]

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[1] See Nuisance, *post*, p. 499.
[2] See *post*, pp. 966, 967.

(iii.) A public nuisance may also give rise to civil proceedings at the suit of a private individual, if he be prejudiced by it in a different manner from the rest of the public. Where that which is a public nuisance inflicts on an individual some special or particular damage, he has a private remedy; he can claim damages and an injunction in a civil action. The rights of the public must be vindicated by a prosecution, not by a private action; else every one of the public could sue. Even where one person suffers inconvenience in common with the rest of the public, and from the circumstances in which he happens to be placed, suffers that inconvenience more frequently or more severely than others, he will not, on that account alone, have a separate right of action. It is only where he sustains some special damage, differing in kind or degree from that which others suffer, that he has a personal remedy; he can bring an action to recover compensation for the particular damage which he has personally sustained.[3]

Throughout the remainder of this chapter we shall deal only with criminal proceedings brought in respect of a public nuisance. In such proceedings the prosecution must first prove the existence of a public nuisance, and next that this state of things was created, or improperly permitted to continue, through some act or omission on the part of the defendant or of his servants. It is not necessary for the prosecution to prove that the defendant intended to cause the nuisance or was guilty of any negligence. It is enough that the nuisance exists on or issues from his premises. The owner or occupier of land is liable if he improperly permits a nuisance to continue thereon; for "neglecting to do a thing which the common good requires" is a public nuisance.[1] Moreover, where works are carried on for the profit of the owner by his servants or agents, he is liable to be indicted for a public nuisance caused by their acts in carrying on the works, though done by them without his knowledge and contrary to his general orders.[2]

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[1] *Att.-Gen.* v. *Shrewsbury Bridge Co.* (1882), 21 Ch. D. 752.
[2] *Att.-Gen.* v. *Squire* (1907), 5 L. G. R. 99.
[3] See *post*, p. 499.

The defendant was the owner and occupier of a vacant piece of land in the metropolis. He had surrounded it by a hoarding; but people threw filth and refuse over, and broke up the hoarding, so that the condition of the land and the use to which it was put constituted a continuing public nuisance. It was held that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance, and an injunction was granted to enforce the performance of that duty. "If the owner of a piece of land does permit it to be in such a state, *e.g.*, smothered or covered with filth, that it is a public nuisance, he commits an indictable offence. He has no defence whatever to an indictment for such a public nuisance. It is no defence to say, 'I did not put the filth on, but somebody else did.' He must provide against this if he can. His business is to prevent his land from being a public nuisance."[3]

In another case the defendant was an old man of over eighty years of age, and was therefore unable to personally superintend the working of his slate quarry, which was managed for him by his sons. This quarry had no spoil-bank, and the rubbish from it was stacked at a place close to the bank of a river. The defendant had erected a wall to prevent it from falling into the river; but in 1847 this wall was carried away by a heavy flood, and from that time all the rubbish deposited there slid into the river and eventually caused a great obstruction to the navigation of it. It was held that the fact that both the defendant and his sons had prohibited their men from depositing rubbish there afforded the defendant no defence to an indictment for the nuisance which had been created.[4]

But where smoke was emitted for ten minutes from the furnace of a pottery works through the negligence of a stoker, and the owner was summoned for negligently using the furnace, it was held that he was not criminally responsible, as his furnace was properly constructed, and he had taken care to employ an efficient foreman to superintend the stokers.[5]

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[1] 1 Hawk. P. C., c. 32, 4. Nuisances, s. 1; quoted with approval by Lindley, L. J., in *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. at p. 566.

[2] *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702; cf. *Harris* v. *Perry & Co.*, [1913] 2 K. B. 219.

[3] *Per* Lindley, L. J., in *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. at p. 566.

[4] *R.* v. *Stephens, suprà.*

[5] *Chisholm* v. *Doulton* (1889), 22 Q. B. D. 736. On the other hand, in a civil action brought in respect of a private nuisance a master will be held liable for every act of

As soon as it has been established by the prosecution that a public nuisance exists and that the defendant is responsible for it, there are not many defences open to the defendant. Proof that the nuisance has existed for many years will not avail him; in some cases, indeed, it is rather an aggravation of the offence. No one can acquire by prescription a right to commit a public nuisance.[1] The lapse of time has not in itself the effect of legalising a nuisance. But the fact that a given state of things is of very long standing may be some evidence that it is not in fact a nuisance.[2]

The fact that the alleged nuisance is a comfort or convenience to some of the public, or even to a large number of persons, is immaterial if it be in fact a nuisance to a large number of other persons.[3]

Thus where an electric telegraph company without legal authority erected telegraph poles in a permanent manner on the waste at the side of a highway, this was held to be a public nuisance, although they had left room enough for the use of the highway and had not affected either the metalled road or the footpath by the side of it, and although the telegraph would have been a convenience to many of the public; but they had in fact obstructed a small portion of space which the public had a legal right to use.[4]

A tramway, which is laid down on a high road without any statutory authority and in such a manner as to obstruct to some extent the use of the road by common carriages, is a public nuisance, although it may be a convenience to a large majority of those who use the road.[5]

It will, however, be a defence to an indictment if the defendant can show that the acts complained of as amounting to a public nuisance were only a reasonable exercise by the defendant of a right which he possessed. Thus it is the right

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his servant done in the course of his employment and within the scope of his authority, although the act may be without the master's knowledge and contrary to his instructions. See *post*, pp. 491, 492.

[1] *Fowler* v. *Sanders* (1617), Cro. Jac. 446; *Mott* v. *Shoolbred* (1875), L. R. 20 Eq. at p. 24.

[2] *R.* v. *Russel* (1827), 6 B. & C. 566; but see the 7th Report of the Criminal Law Commissioners at p. 59; and *Att.-Gen.* v. *Terry* (1874), L. R. 9 Ch. 423.

[3] *R.* v. *Train* (1862), 2 B. & S. 640; and see *Soltau* v. *De Held* (1851), 2 Sim. N. S. at p. 143; and *Att.-Gen.* v. *Corporation of Manchester*, [1893] 2 Ch. 87.

[4] *R.* v. *United Kingdom Telegraph Co.* (1862), 3 F. & F. 73; 31 L. J. M. C. 166. As to overhead telephone wires, see *Wandsworth Board of Works* v. *United Telephone Co., Ltd.* (1884), 13 Q. B D. 904. As to electric standards, see *Chaplin* v. *Westminster Corporation*, [1901] 2 Ch. 329.

[5] *R.* v. *Train, suprà.*

of the public to pass and repass along any highway; but there is involved in this the right occasionally to draw up a vehicle to one side of the highway for the purpose of enabling passengers to alight, or of loading or unloading goods.[1] Such a temporary stoppage is but a reasonable use of the highway and not an indictable obstruction, although it may to some extent impede or interfere with the traffic. A navigable river is a public highway as far as the ebb and flow of the tide extends; yet the public have a right to anchor ships in such part of the river for a reasonable time to take in cargo.[2] But a riparian owner has no right to erect any permanent obstruction in such a river (such as a landing-stage on piles), even though it may be a convenience to some of the public.[3] So it is often necessary and proper to obstruct the traffic for the purpose of repairing the roadway, or the drains or gas pipes beneath, or of pulling down and rebuilding a house on the land immediately adjoining the highway. But to allow waggons to stand before a warehouse so as to occupy a great part of the street for several hours by day and night is an indictable misdemeanour.[4]

It will be a defence to an indictment for a public nuisance, if it can be established that every one, whose health, comfort or property is in any way in danger of being impaired by it, could by exercising a moderate and reasonable degree of caution avoid all chance of harm; but not if the danger can only be averted by a degree of prudence and care, the continual exercise of which cannot be reasonably expected from the innocent public.[5]

Again, it will be a defence to an indictment if the defendant can show that he was authorised by statute to do the acts which caused the nuisance. But the Court will not construe a statute as justifying a nuisance, unless the words are clear and express.[6]

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[1] See *Thorpe* v. *Brumfitt* (1873), L. R. 8 Ch. 650.

[2] *R.* v. *Russel* (1827), 6 B. & C. 566.

[3] *Att.-Gen.* v. *Terry* (1874), L. R. 9 Ch. 423.

[4] *R.* v. *Russell* (1805), 6 East, 427; *Att.-Gen.* v. *Brighton, &c., Supply Association*, [1900] 1 Ch. 276.

[5] *Lister's Case* (1857), Dearsl. & B. 209.

[6] See *Hill* v. *Metropolitan Asylum District Board* (1879), 4 Q. B. D. 433; and the judgment of Bowen, L. J., in *Truman* v. *L. B. & S. C. Ry. Co.* (1885), 29 Ch. D. at p. 108; and *post*, p. 511.

A railway company was authorised by Act of Parliament to make a railway within five yards of an ancient public high road, and to run trains on such railway. The Act did not require the railway company to screen the line from the road. It was held that running trains on this railway was not a public nuisance, although the locomotives frightened the horses of persons who used the high road as a carriage-way.[1]

Lastly, a local authority is not liable for a nuisance which it cannot prevent without bringing an action against a third person.[2]

It will be seen from the preceding pages that the definition of a public nuisance is a very wide and elastic one; and the Court is unwilling to restrict the definition within any rigid classification. We may, however, group the most frequent instances together under three heads:—

I. Nuisances to the health, safety or comfort of the public.

II. Nuisances to public morals and decency.

III. Nuisances to public rights of passage.

I. *Nuisances to the Health, Safety or Comfort of the Public.*

As to nuisances under this head, it is unnecessary to do more than cite a few instances, which will show the wide extent and great variety of this class of crimes.

Thus any one, who carries on an offensive trade in such a manner as to seriously annoy any considerable number of persons in the neighbourhood, as by causing vibration, emitting sparks or unwholesome smells, or making loud noises, is guilty of a public nuisance. "Every man has a natural right to enjoy the air pure and free from noxious smells or vapours, and any one who sends on his neighbour's land that which makes the air impure is guilty of a nuisance."[3] So, too, those who carry on trades in such a manner that they are dangerous to the public, such as the manufacture of fireworks or dynamite, are guilty of a public nuisance.[4]

Any one, who carries a child suffering from small-pox through a public street or drives a glandered horse to a public fair, commits a public nuisance.[5] Various statutes have been passed with the same object—to prevent the spread of infectious diseases—such as the Vaccination Acts 1867 to 1907,[1] the Infectious Disease (Notification) Act, 1889,[2] and the Infectious Disease (Prevention) Act, 1890.[3] Again, any illegal disposition of a corpse or the disturbance of human remains in a churchyard or burial ground is also a public nuisance. But for the relatives of a deceased person to burn the body instead of burying it is not a misdemeanour unless the process is so conducted as to be a public nuisance, or unless it is done to prevent the holding of an intended coroner's inquest.[4] Burning down one's house in a manner dangerous to others is a public nuisance.[5]

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[1] *R.* v. *Pease* (1832), 4 B. & Ad. 30.

[2] *Att-Gen.* v. *Guardians of Poor of Dorking* (1882), 20 Ch. D. 595; but see *Jones* v. *Llanrwst U. D. C.*, [1911] 1 Ch. 393, 409.

[3] *Per* Lopes, L. J., in *Chastey* v. *Ackland*, [1895] 2 Ch. at p. 396.

[4] See the Explosives Act, 1875 (38 & 39 Vict. c. 17); the Petroleum Acts, 1871—1881 (34 & 35 Vict. c. 105; 42 & 43 Vict. c. 47; 44 & 45 Vict. c. 67); and *R.* v. *Bennett* (1858), 28 L. J. M. C. 27.

[5] *R.* v. *Vantandillo* (1815), 4 M. & S. 73; *R.* v. *Hanson* (1852), Dearsl. 24.

Common barratry is a form of public nuisance at common law. Any one, who habitually incites or stirs up suits and quarrels between His Majesty's subjects to the annoyance of the neighbourhood, commits the misdemeanour of barratry and is liable to be fined or imprisoned, or to be required to find sureties for good behaviour or for the peace. It differs from maintenance[6] in that in order to convict a man of barratry it is necessary to prove that he habitually incited or stirred up suits. The fact that he incited or stirred up one suit is not sufficient to make him a common barrator. But a man who brings actions in his own right, however many or groundless, is not guilty of this offence.[7]

II. *Nuisances to Public Morals and Decency.*

We have already dealt with many public nuisances of this class in the preceding chapter. Thus, exposing the person in any public place is a public nuisance; but the offence is usually dealt with under the Vagrancy Act.[8] Again, exhibiting obscene books or pictures is also a public nuisance,[9] and so is every disorderly house.

Disorderly houses are of three kinds:—

(i.) Brothels.[10]

(ii.) Gaming or betting houses.

(iii.) Disorderly places of entertainment.

A common gaming house is one in which games of chance or of chance and skill are played, in which the chances of success are not equally favourable to all the players, including in the term players the one who keeps the bank.[1]

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[1] 30 & 31 Vict. c. 84; 35 & 36 Vict. c. 98; 37 & 38 Vict. c. 75; 61 & 62 Vict. c. 49; 7 Edw. VII. c. 31.

[2] 52 & 53 Vict. c. 72.

[3] 53 & 54 Vict. c. 34. And see 7 Edw. VII. c. 53, ss. 52—68.

[4] *R.* v. *Price* (1884), 12 Q. B. D. 247; *R.* v. *Stephenson* (1884), 13 Q. B. D. 331; and see the Cremation Act, 1902 (2 Edw. VII. c. 8), s. 8; *R.* v. *Byers* (1907), 71 J. P. 205.

[5] *R.* v. *Probert* (1799), 2 East, P. C. 1030.

[6] See *ante*, p. 206.

[7] *Some's Case* (1615), Viner's Abridgment, "Barrator." A conviction for barratry is very rare, although an indictment for it was found and tried so recently as 1889.

[8] See *ante*, p. 225.

[9] See *ante*, pp. 227—230.

[10] See *ante*, p. 223.

A common betting house is a house, room or other place kept or used for the purpose of betting or for the purpose of paying money lost on bets. A betting house is deemed to be a gaming house; the police have the right of entry into either.

Disorderly places of entertainment include all places within twenty miles of London kept for public dancing, music or other entertainment without a licence, all places opened and used on Sundays for entertainments or debates, admission to which places is obtained by the payment of money.[2]

Again, publicly advertised lotteries have been declared public nuisances by statute,[3] but are rarely punished on indictment. A lottery has been defined as a distribution of prizes by lot or chance irrespective of skill.[4] But if the prizes are distributed after a competition for them, in which skill plays some part (although a small one), this will not be a lottery.[5]

Frequenting any street for the purpose of betting is also a public nuisance.[6]

III. *Nuisances to Public Rights of Passage.*

Any acts, which obstruct the rights of the public over highways, bridges and public navigable rivers, or which render the use of them by the public less commodious, are public nuisances; this class of public nuisances requires more detailed treatment, as it is of great general importance.

It is a misdemeanour at common law, punishable on indictment or information with fine and imprisonment, for any man to obstruct a highway; for this is an injury to the community at large. Cutting a trench, or digging a ditch across a highway, ploughing it up, or erecting any fence or building, or placing any timber, stones or other obstacle on any part of it, is an illegal obstruction to the passage of the public along the way. Every one, in short, commits a public nuisance who does anything which renders the highway less commodious to the public than it would otherwise be; or who prevents them from having access to any part of it by an excessive and unreasonable, though temporary, use of it; or who so deals with the land in the immediate neighbourhood of the highway as to prevent the public from using and enjoying it securely.

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[1] Gaming Act, 1845 (8 & 9 Vict. c. 109); and see 16 & 17 Vict. c. 119.

[2] 25 Geo. II. c. 36; 38 Vict. c. 21; 57 & 58 Vict. c. 15.

[3] 10 Will. III. c. 23, s. 1; 42 Geo. III. c. 119, s. 1; 4 Geo. IV. c. 60, s. 41.

[4] *R.* v. *Harris* (1866), 10 Cox, 352; *Barclay* v. *Pearson*, [1893] 2 Ch. 154.

[5] *Stoddart* v. *Sagar*, [1895] 2 Q. B. 474; *Hall* v. *Cox*, [1899] 1 Q. B. 198; *R.* v. *Stoddart*, [1901] 1 Q. B. 177.

[6] See 6 Edw. VII. c. 43, s. 1; *Dunning* v. *Swetman* (1909), 100 L. T. 604; and see the provisions of 2 & 3 Vict. c. 47, s. 54, and 10 & 11 Vict. c. 89, s. 28

Thus it is a misdemeanour—

to saw timber or carry on any other trade in the street;[1]

to allow waggons to stand before a warehouse for an unreasonable time so as to occupy a great part of the street for several hours by day or night;[2]

to dig up the roadway without statutory authority in order to lay down gas-pipes;[3]

to excavate an area close to a footpath and leave it unfenced;[4] or

to blast stone in a quarry so as to throw stones upon a public road or the houses abutting on it.[5]

And if a tramway be illegally laid down on a high road so as to obstruct the use of the road by common carriages, it is a public nuisance, although it may be a great convenience to many who go that way.[6]

Whether the obstruction proved is such as may in law amount to a nuisance is a question for the judge; whether the particular obstruction complained of is in fact a nuisance to the public is for the jury.[7] In strict law the smallest obstruction is illegal; but the consequences of the obstruction of a public thoroughfare or navigable river may in some cases be "so slight, uncertain and rare" as not to entail on the offending party criminal responsibility.[8]

Thus, in *R.* v. *Bartholomew*,[9] the defendant had unlawfully erected and maintained a coffee-stall in the middle of the roadway of a public street.

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[1] *R.* v. *Jones* (1812), 3 Camp. 230.

[2] *R.* v. *Russell* (1805), 6 East, 427; *Att.-Gen.* v. *Brighton, &c., Supply Association*, [1900] 1 Ch. 276.

[3] *R.* v. *Stoke Fenton Gas Co.* (1860), 29 L. J. M. C. 148.

[4] *Barnes* v. *Ward* (1850), 9 C. B. 392.

[5] *R.* v. *Mutters* (1864), 10 Cox, 6.

[6] *R.* v. *Train* (1862), 2 B. & S. 640.

[7] *R.* v. *Betts* (1850), 16 Q. B. 1022, 1038.

[8] *R.* v. *Tindall* (1837), 6 A. & E. 143; *R.* v. *Charlesworth* (1851), 16 Q. B. 1012.

[9] [1908] 1 K. B. 554.

The stall was of a permanent character, having gas and water laid on to it from the mains, and being assessed to the rates at £32. There was sufficient room for the passage of traffic up and down the street on either side of the stall. On an indictment of the defendant for a nuisance in thereby obstructing the highway, the jury found that the coffee-stall was an obstruction, but that it did not appreciably interfere with the traffic in the street, and it was held that the findings did not justify the entry of a verdict of guilty.

The owner of land, over which a public footpath lies, has the right to maintain existing stiles or swing gates across it, provided they are of a reasonable kind and are such that the public are not debarred from the use of the footway. But it will be the duty of the district council to see that the use by the public of a footpath is not hindered by the erection of stiles or gates, which are substantially less convenient than those which existed there in the past. It is the duty of the district council to prevent encroachment; and for this purpose they should institute or defend any legal proceedings and generally take such steps as they deem expedient.[1]

Again, it is a misdemeanour at common law, punishable on indictment or information with fine and imprisonment, for any person who is bound in law to repair a highway to omit to do so; for such omission passively obstructs the public in their use of the road. It is necessary, therefore, in the first place to inquire who are the persons on whom such a liability rests.

At common law it is the duty of the inhabitants of each parish to maintain and repair all highways within it. There is no escape from this liability. No contract will free the parishioners from it. It may be suspended, if for any reason the burden can be shifted on to others; but it revives as soon as the liability of those others ceases.[2] And in spite of all the changes introduced by the various Local Government Acts, if a "highway repairable by the inhabitants at large" be out of repair, it is still open to any person aggrieved to indict the inhabitants of the parish, though in certain cases a highway authority may be indicted in respect of the non-repair of a highway.[3]

The duty of repairing a public highway may in some instances fall on a private person, *e.g.*, if he owns the land across which the highway runs and it is a term of his tenure that he shall keep the road in repair; or if he has enclosed part of the common across which the road runs, and thus has obtained a private benefit at the expense of the public. In all other cases, the old rule was that as soon as a highway was dedicated to the public it was the duty of each parish through which it passed to repair the portion of it which was within the parish. This was altered by the Highway Act of 1835,[1] with respect to all highways which should be dedicated to the use of the public after March 20, 1836. The local authority has now a right to determine whether it will or will not "take over" a new road. It probably will decline to do so, until the road has been "sewered, levelled, paved, flagged, metalled, channelled and made good" to the satisfaction of its surveyor; it is not bound to do so even then. But as soon as the local authority takes over the road, the expense of keeping it in proper repair falls in future upon the rates. If the highway authority declines to take over the road, it is no one's duty to keep it in repair.

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[1] Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26; and see *Louth U. D. C.* v. *West* (1896), 60 J. P. 600.

[2] *R.* v. *Oxfordshire* (1825), 4 B. & C. 194.

[3] See s. 10 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77).

Thus an indictment lies against any one who is bound to repair a road *ratione tenuræ* (*i.e.*, by reason of the terms under which he holds the adjoining land), if he neglects his duty in this respect.[2] In former days the question of liability *ratione tenuræ* was generally raised and decided on an indictment; now it is more frequently settled by a proceeding under section 25 (2) of the Local Government Act, 1894.

An indictment still lies against the inhabitants of a parish if any highway in the parish which is repairable by the district or county council be out of repair. But an indictment for non-repair of a highway will not lie against a parish council.[3] It did not lie formerly against a surveyor of highways;[4] therefore it did not lie against a highway board to which the duties and liabilities of such surveyor were transferred.[5] But under section 10 of the Highways and Locomotives (Amendment) Act, 1878,[6] an indictment will lie against a district council for non-repair of a highway.[7]

The above misdemeanours are triable either at the Assizes or at Quarter Sessions. The defendant is a competent witness, and may be compelled to give evidence for the prosecution.[1] It will be a defence to an indictment against parishioners, if they can show that a particular landowner is bound to repair that particular highway or portion of a highway, or that by custom a particular hundred or township in the parish is bound to repair it. But such a defence must be specially pleaded.

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[1] 5 & 6 Will. IV. c. 50, s. 23; and see ss. 94—96.

[2] *R.* v. *Barker* (1890), 25 Q. B. D. 213.

[3] *R.* v. *Shipley P. C.* (1897), 61 J. P. 488.

[4] *Young* v. *Davis* (1863), 2 H. & C. 197.

[5] See *R.* v. *Mayor of Poole* (1887), 19 Q. B. D. at p. 608; *Loughborough Highway Board* v. *Curzon* (1886), 16 Q. B. D. at p. 570.

[6] 41 & 42 Vict. c. 77.

[7] *R.* v. *Mayor, &c., of Wakefield* (1888), 20 Q. B. D. 810. For examples of such an indictment, see *R.* v. *Biggleswade R. D. C.* (1900), 64 J. P. 442; *R.* v. *Southport Corporation* (1901), 65 J. P. 184; *R.* v. *Crompton U. D. C.* (1902), 86 L. T. 762.

It is a misdemeanour for any person, who is bound by law to repair a bridge, to leave it unrepaired. It is a felony unlawfully and maliciously to pull or throw down, or in any way to destroy or do any injury to, any bridge (whether over a stream or not), viaduct or aqueduct over or under which a highway, railway or canal passes, with intent to make such bridge, viaduct, aqueduct, highway, railway or canal dangerous or impassable. The maximum punishment for this offence is penal servitude for life. Male offenders under sixteen may also be whipped.[2] The offence is not triable at Quarter Sessions.[3]

It is equally a misdemeanour wilfully to divert or obstruct the course of any navigable river so as appreciably to diminish its convenience for purposes of navigation, even though the alteration may, upon the whole, be for the convenience of the public.[4] It will, however, be no crime, if the obstruction be caused by a vessel which was sunk through an unavoidable accident.[5] But even in that case it is the duty of the owner, so long as he retains possession and control of it, to buoy his vessel or otherwise provide against other vessels striking on it.[6] Similarly, it is a misdemeanour to allow any obstruction to navigation to exist in a public harbour.[7]

There are also many highway offences triable summarily before justices:—

Any person, who works a steam-engine or other machinery, or sinks a shaft, within twenty-five yards of the centre of a carriage-way, or erects a windmill within fifty yards of it, will be liable to be fined £5 unless sufficient screens are erected to prevent horses being frightened.[1]

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[1] 40 & 41 Vict. c. 14, s. 1, which is not repealed by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36); see s. 6

[2] 24 & 25 Vict. c. 97, ss. 33, 58, 73; 54 & 55 Vict. c. 69, s. 1.

[3] 5 & 6 Vict. c. 38, s. 1.

[4] *R.* v. *Randall* (1842), Car. & M. 496; *R.* v. *Russell* (1854), 23 L. J. M. C. 173.

[5] *R.* v. *Watts* (1798), 2 Esp. 675.

[6] *White* v. *Crisp* (1854), 10 Ex. 318.

[7] *R.* v. *Williams* (1884), 9 App. Cas. 418.

So it is an offence for which every person offending may be fined 40*s*. over and above the damages which he occasions [2] :—

To wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot-passengers.

To wilfully lead or drive any horse, ass, sheep, mule, swine or cattle, or carriage of any description, or any truck or sledge, upon any such footpath or causeway.

To tether any horse, ass, mule, swine or cattle on any highway so as to suffer or permit the tethered animal to be thereon.

To cause any injury or damage to be done to the surface of any highway, or to the hedges, posts, rails, walls or fences of any highway.

To wilfully obstruct the passage of any footway.

To dig or cut down the banks which are the securities and defence of any highway.

To pull down, destroy, obliterate or deface any milestone or post, graduated or direction post or stone, erected upon any highway.

To play football or any other game on any part of a highway to the annoyance of any passenger.[3]

For any hawker, higgler, gipsy or other person travelling, to pitch any tent, booth, stall or stand, or to encamp upon any part of any highway.

To make or assist in making any fire, or wantonly fire off any gun or pistol, or set fire to or wantonly let off or throw any squib, rocket, serpent or other firework whatsoever within fifty feet of the centre of any carriage-way or cartway.

To bait, or run for the purpose of baiting, any bull upon or near any highway.

To lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish or other matter or thing whatsoever upon any highway, to the injury, interruption or personal danger of any person travelling thereon.

To suffer any filth, dirt, lime or other offensive matter or thing whatsoever to run or flow into or upon any highway from any house, building, erection, lands or premises adjacent thereto.

The owner of any cart or waggon will be liable to a fine not exceeding 40*s*., if it has not his name and address painted on the off-side in white letters not less than an inch high on a black background or in black letters on a white ground.[4]

Any person riding without reins, or leaving a vehicle on the road, or keeping his wrong side and obstructing the free passage of others, or riding or driving furiously so as to endanger the life or limb of any passenger, is liable to a penalty.[1] A person riding a bicycle on a highway at such a pace as to be dangerous to passers-by may be convicted of furiously driving under this section.[2]

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[1] Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 70.
[2] *Ib.* s. 72.
[3] *Pappin* v. *Maynard* (1863), 27 J. P. 745.
[4] *Ib.* s. 76.

The owner of any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid or swine found straying or lying about a highway, or the sides (except such parts of it as pass over common waste or unenclosed ground), is liable to a penalty not exceeding 5*s.* for every animal, up to 30*s.*, recoverable summarily with the expenses of removal.[3]

Any person who encroaches by making or causing to be made any building or pit, or hedge, ditch or other fence, or by placing any dung, compost or other materials for dressing land, or any rubbish, on the side or sides of any carriage-way or cartway, within fifteen feet of the centre thereof, will be liable on conviction for every such offence to pay a fine not exceeding 40*s.*, in addition to the costs of removing the obstruction.[4] Proceedings under this section must be taken within six months from the completion of the obstruction, otherwise the remedy will have to be by indictment.

Every person who rides a bicycle or tricycle more than an hour after sunset without carrying a lighted lamp is liable on summary conviction for each and every such offence to a fine not exceeding 40*s.*[5] But though this Act expressly declares bicycles and tricycles to be "carriages" within the meaning of the Highway Acts, it contains no provision enabling a constable to arrest an offender without warrant; nor does it incorporate section 78 of the Highway Act, 1835. Hence there is no power to arrest a bicyclist, who is travelling at night without a lighted lamp and who refuses to stop when called on by a constable to do so.[6]

Provision has been made by various Acts of Parliament for the regulation of traffic on highways with the object of ensuring the safety of the public and of preventing unfair wear and tear of the highway. Chief among these Acts are the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36); the Locomotives Act, 1898 (61 & 62 Vict. c. 29);[7] and the Motor Car Act, 1903 (3 Edw. VII. c. 36), which is annually continued by the Expiring Laws Continuance Act. These statutes and the orders made under them by the Local Government Board provide for the registration of motor cars, the licensing of drivers, and generally regulate the use and construction, as well as the speed, of motor cars. The maximum speed at which a motor car may be driven along a public highway is twenty miles per hour, and no person may drive a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which at the time actually is, or might reasonably be expected to be, on the highway.[1]

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[1] Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 78.

[2] *Taylor* v. *Goodwin* (1879), 4 Q. B. D. 228.

[3] Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25; and see *Golding* v. *Stocking* (1869), L. R. 4 Q. B. 516, and *Bothamley* v. *Danby* (1871), 24 L. T. 656.

[4] Highway Act, 1864, s. 51.

[5] Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 85.

[6] *Hatton* v. *Treeby*, [1897] 2 Q. B. 452.

[7] As to the emission of sparks, see the Railway Fires Act, 1905 (5 Edw. VII. c. 11).

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[1] See ss. 1 and 9 of the Motor Car Act, 1903 (3 Edw. VII. c. 36).

CHAPTER X.

CONSPIRACY.

A CONSPIRACY is an agreement by two or more persons to carry out an unlawful common purpose or to carry out a lawful common purpose by unlawful means. It is a misdemeanour at common law, punishable with fine and imprisonment to any extent; and also with hard labour in the case of "any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert or defeat the course of public justice."[1] The offence is not triable at Quarter Sessions, unless the conspiracy is to commit a crime which would be triable at Quarter Sessions if committed by one person.[2]

It is a statutory misdemeanour,[3] punishable with ten years' penal servitude, to conspire to murder, or to endeavour to persuade or propose to any one to murder, any person, whether he be a subject of His Majesty or not, and whether he be within the King's dominions or not. Apparently no other conspiracy here to commit a crime abroad is triable in this country; still less is a conspiracy abroad to commit a crime here.

The crime consists in the bare consent and agreement of the parties.[4] It is not necessary that any of them should do any act in pursuance of their agreement. This is no breach of the rule laid down by Lord Mansfield, C. J., in *R.* v. *Scofield*,[5] that a bare intent, however criminal, is not punishable by our law; for the agreement itself is an act, and will remain a crime, even though all the conspirators should afterwards repent of their purpose and take no further step in pursuance of it. "The overt acts which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed."[1] Yet they are often the only evidence of that agreement, and are usually set out in the indictment, although this is not essential.[2]

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[1] 14 & 15 Vict. c. 100, s. 29.

[2] Quarter Sessions Act, 1842 (5 & 6 Vict. c. 38), s. 1.

[3] 24 & 25 Vict. c. 100, s. 4. An article in a newspaper, exulting over the assassination of the Emperor of Russia and commending it as an example, was held to be an encouragement or endeavour to persuade to murder within this section, although it was not addressed to any one in particular: *R.* v. *Most* (1881), 7 Q. B. D. 244.

[4] See the judgments of Tindal, C. J., in *O'Connell* v. *R.* (1844), 11 Cl. & F. at p. 233, and of Lord Chelmsford in *Mulcahy* v. *R.* (1868), L. R. 3 H. L. at p. 328.

[5] (1784), Cald. S. C. at p. 403.

Conspiracy consists "in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, act against act. . . . The number and the compact give weight and cause danger."[3]

If in carrying into effect a criminal conspiracy the conspirators inflict loss or damage on a private individual, he will have a private action for the particular damage which he has thus separately suffered. "The damage sustained by the plaintiff is the ground of the action, and not the conspiracy."[4] And the damage must be either the natural and necessary consequence of the defendants' acts, or the defendants must have contemplated or intended that such damage should fall on the plaintiff; otherwise it will be too remote. The crime is complete as soon as the unlawful agreement has been made; but to sustain a civil action there must be a conspiracy, a wrongful act done in pursuance of it without sufficient justification, and damage to the plaintiff. This class of civil actions founded upon criminal conspiracies is discussed in Book III., Chap. XV.

If two or more agree to do a seditious act or to publish seditious words, each is guilty of a seditious conspiracy.[5]

If one man urges another to join with him in any criminal act and the other refuses to do so, he is guilty of the misdemeanour of inciting or soliciting the other to commit that crime; if the other agrees to join with him, both are guilty of a conspiracy. If either of them subsequently attempts to carry out their common criminal purpose, each is liable for anything done by the other in furtherance of that purpose; and everything said or done by either conspirator is, after due proof of the conspiracy, evidence against the other. If the projected crime be committed, the prisoners may be indicted for that crime or for the conspiracy, or for both. This is so, even where the crime projected is a felony; for though it was an ancient rule of the common law that in such a case the conspiracy, being only a misdemeanour, merged in the felony, it has since been provided by statute that a defendant indicted for a misdemeanour is not entitled to be acquitted on the ground that the evidence proved that he had committed a felony.[1]

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[1] *Per* Lord Brampton in *Quinn* v. *Leathem,* [1901] A. C. at p. 530.

[2] See the Indictments in the Appendix, Nos. 6 and 7.

[3] *Per cur.* in *Mulcahy* v. *R.* (1868), L. R. 3 H. L. at p. 317, cited with approval by Lord Brampton in *Quinn* v. *Leathem,* [1901] A. C. at p. 529, and by the Court in *R.* v. *Brailsford,* [1905] 2 K. B. at p. 746.

[4] *Skinner* v. *Gunton* (1669), 1 Wms. Saund. 229 b, n. 4; Buller's Nisi Prius, 14; *Barber* v. *Lesiter* (1860), 29 L. J. C. P. 161, 165.

[5] See *ante*, p. 154.

In every conspiracy two persons at least must be concerned. And such two persons must not be husband and wife; for here the old common law rule still holds good that husband and wife are one person in law. If A. and B. are jointly indicted for a conspiracy and A. is acquitted, B. must be acquitted too, however criminal his conduct may have been. This is so, even where he has pleaded guilty to the charge.[2] But a man may be indicted alone for conspiring "with other persons to the jurors unknown," or with persons who have since died, or with a person who is specially protected by statute from any penal consequences of the act which they had conspired to do.[3]

A criminal conspiracy, then, is an agreement to carry out an unlawful common purpose or to carry out a lawful common purpose in an unlawful manner. But it is necessary to explain the meaning of the word "unlawful" in this definition; for the word is often loosely used.

Clearly, every conspiracy to commit a crime is criminal. So are most conspiracies to commit a tort. But not every conspiracy to commit a tort is criminal. Thus in *R.* v. *Turner and others*,[4] it was held that a combination of eight persons to commit a merely civil trespass in the *bonâ fide* assertion of an alleged common right was not indictable. But the phrase

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[1] 14 & 15 Vict. c. 100, s. 12.

[2] *R.* v. *Plummer*, [1902] 2 K. B. 339.

[3] *R.* v. *Duguid* (1906), 94 L. T. 887. And see *R.* v. *Perrin* (1908), 72 J. P. 144.

[4] (1811), 13 East, 228; this decision was adversely criticised by Lord Campbell in *R.* v. *Rowlands* (1851), 17 Q. B. 671; but the latter case was in its turn doubted in *Mogul Steamship Co.* v. *McGregor* (1889), 23 Q. B. D. 598; and in *Allen* v. *Flood*, [1898] A. C. 1.

"unlawful common purpose" not only covers all crimes and most torts; it also includes some acts, which are neither torts nor crimes, but are nevertheless in some way fraudulent or corrupt, flagrantly immoral or obviously injurious to the public interest.[1] It is impossible to define these acts with greater precision. But if two or more persons agree to do any of these acts, an indictment will lie against them for conspiracy; for such an agreement is regarded as a danger to the State.

Thus, it is an indictable conspiracy for A. and B. to agree together—

- to induce a woman C. to become a common prostitute, whether she be chaste or not, and whether the inducement succeed or not; [2]
- to falsely accuse D. of a crime; [3]
- to defraud the public by holding a mock auction[4] (but for them to agree together not to bid against each other at a real auction is not indictable[5]);
- to raise the price of the funds by false rumours; [6]
- to "pull a horse" and prevent it winning a race; [7]
- to defraud their partner, by means of false accounts, the fraud not being in itself criminal at the time when it was committed; [8]
- to procure from the Foreign Office by false representations a passport for a foreigner to enable him to travel in Russia as a British subject and under a British name; for such an act would tend to stir up ill-feeling between this country and Russia, and so to produce a public mischief. [9]

In the last case Lord Alverstone, C. J., in delivering the judgment of the Court, said: "It cannot, of course, be maintained that every fraud and cheat constitutes an offence against the criminal law, but the distinction between acts which are merely improper or immoral and those which tend to produce a public mischief has long been recognised. . . . Whatever attempts may have been made from time to time to strain the law of conspiracy or to bring within its purview combinations to perform acts, to which no objection can be taken when done by a single individual,[10] no question of the kind arises in this case." If "the issue of a public document by a public department of State is obtained by a false representation for an improper purpose, *i.e.*, for use by a different person passing himself off as the *bonâ fide* holder, we are of opinion that it is injurious to the public and tends to bring about a public mischief." The Court also decided that in such a case it was not necessary for the prosecution to allege in the indictment, or to prove by evidence at the trial, that the defendants intended to create any public mischief. "We are of opinion that it is for the Court to direct the jury as to whether such an act may tend to the public mischief, and that it is not in such a case an issue of fact upon which evidence can be given."[1]

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[1] *R.* v. *Whitaker*, [1914] 3 K. B. 1283.

[2] *R.* v. *Howell* (1864), 4 F. & F. 160; and see *R.* v. *Delaval* (1763), 1 Wm. Blackstone, 410, 439; *R.* v. *Lord Grey* (1682), 9 St. Tr. 127.

[3] *Poulterer's Case* (1611), 9 Rep. 55; *R.* v. *Spragg* (1760), 2 Burr. 993, 1027.

[4] *R.* v. *Lewis* (1869), 11 Cox, 404.

[5] *Heffer* v. *Martin* (1867), 15 W. R. 390, overruling *Levi* v. *Levi* (1833), 6 C. & P. 239.

[6] *R.* v. *De Berenger* (1814), 3 M. & S. 67; *R.* v. *Aspinall* (1876), 1 Q. B. D. 730; 2 Q. B. D. 48.

[7] *R.* v. *Orbell* (1704), 6 Mod. 42.

[8] *R.* v. *Warburton* (1871), L. R. 1 C. C. R. 274.

[9] *R.* v. *Brailsford*, [1905] 2 K. B. 730.

[10] See *post*, pp. 628—633.

So it is a criminal conspiracy for an accused person to agree to indemnify his bail against any loss which they would sustain should the accused not appear to take his trial, for such an agreement obviously tends to pervert and obstruct the course of justice; and it is not necessary that the jury should expressly find that the parties intended this result.[2]

Again, "the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment."[3]

Where the act contemplated by the parties is in itself lawful, a conspiracy to carry it into effect may still be criminal if the parties agree to attain their end by unlawful means. But such unlawful means must consist of violence, duress, threats, stratagem, fraud or some other unfair trickery. Mere peaceable persuasion towards a lawful act is not sufficient.[4]

Thus, where certain parishioners conspired together to induce a woman, chargeable to their own parish, to marry a man who was a pauper chargeable to a neighbouring parish, so as to throw upon that parish the burden of maintaining her as well, it was held that no indictment lay, as it was not alleged that any violence, threat or other sinister means were employed or that the paupers were at all unwilling to marry each other.[5]

There are, then, some cases—though few in number—in which an agreement to do an act, which is neither a crime nor a tort, is yet indictable. But it may be asked, does an agreement to break a contract or an agreement to induce others to break their contracts fall within this category? This is a question which has been much debated during the last fifty years and which still remains difficult to decide.

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[1] *R.* v. *Brailsford,* [1905] 2 K. B. at pp. 745—747.

[2] *R.* v. *Porter,* [1910] 1 K. B. 369.

[3] *Per* Sir J. Mansfield, C. J., in *Clifford* v. *Brandon* (1809), 2 Camp. at p. 369, (see note on p. 372); and see the decision in *Gregory* v. *Duke of Brunswick* (1843), 1 C. & K. 24. cited *post*, p. 629.

[4] See the judgment of Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor* (1889), 23 Q. B. D. at p. 614, cited with approval by Kennedy, L. J., in *National Phonograph Co., Ltd.* v. *Edison Bell, &c., Co., Ltd.*, [1908] 1 Ch. at p. 369.

[5] *R.* v. *Seward and others* (1834), 1 A. & E. 706.

On one point, however, the answer now is clear. Such an "interference with contractual relations" generally arises "in contemplation or furtherance of a trade dispute between employers and workmen," and when that is the case, no agreement, which affects contract merely, is a crime. This is expressly provided by section 3 of the Conspiracy and Protection of Property Act, 1875,[1] which enacts that:—

> "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime.
>
> Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.
>
> A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the Court as an alternative for some other punishment.
>
> Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act, which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person."[2]

Hence now a combination to raise the scale of wages or to alter the hours of work, and any strike, peaceably conducted, which arises out of "a trade dispute," is no longer a crime. Workmen may lawfully combine in trade unions or otherwise to protect their own interests. But it is a crime for workmen out on strike to persistently follow about or annoy such of their fellow-workmen as are still at work, to intimidate them or their wives or children, to watch or beset their houses, to hide their tools, &c.[3] Any of these acts is a crime punishable with a fine not exceeding £20 or with imprisonment not exceeding three months with or without hard labour. It follows that any combination, which necessarily involves, or in which the parties contemplate, the employment of any such unlawful means, is still a criminal conspiracy, even though it arises out of a trade dispute; this is so, whether the conspiracy is a combination of workmen or of employers.[1]

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[1] 38 & 39 Vict. c. 86.

[2] As to what acts will be deemed to be done "in contemplation or furtherance of a trade dispute" within the meaning of s. 3 of this Act, see *Conway* v. *Wade*, [1909] A. C. 506, *post*, p. 633.

[3] *Ib.* s. 7. As to a conspiracy to force an employer to take back a dismissed employee, see *R.* v. *Wall* (1907), 21 Cox, 401.

But for one man merely to break a contract is no crime, and for one man merely to induce another to break his contract—though a tort—is no crime. Hence for several persons to combine to do either act in connection with a trade dispute is by virtue of section 3—set out above—no crime, so long as no violence or intimidation is either used or threatened. Moreover, the Trade Disputes Act, 1906, gives a very wide definition of the term "trade dispute;" it includes "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person."[2]

There remain those cases in which the agreement to interfere with contractual relations does not arise "in contemplation or furtherance of a trade dispute between employers and workmen." In these cases there is no statute to protect the defendants from the rigour of the common law; and we have, therefore, still to inquire whether such an agreement is a crime.

There are three cases which must be considered separately:—

(i.) A. and B. agree to break their contracts with C., and to induce X. and Y. to do the same.

(ii.) A. and B. agree to determine by lawful notice their contracts with C., and to induce X. and Y. to do the same.

(iii.) A. and B. agree not to enter into any contracts with C., and to induce X. and Y. to do the same.

(i.) There are, as we have already seen,[3] a few cases in which a breach of contract is in itself a crime; a conspiracy to commit or to incite others to commit any such breach of contract would clearly be criminal. But in all other cases a breach of contract by one of the contracting parties is no crime and no tort. For a stranger to the contract, however, without just cause or excuse, knowingly to induce one of the contracting parties to break his contract, is a tort;[1] and, therefore, for several persons to combine in so inducing a breach of contract is a criminal conspiracy.[2]

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[1] *R.* v. *Bauld* (1876), 13 Cox, 282.

[2] 6 Edw. VII. c. 47, s. 5, sub-s. (3); and see the Industrial Courts Act, 1919 (9 & 10 Geo. V. c. 69), s. 8.

[3] *Ante,* p. 106.

Thus, if two or more actors in a theatrical company should each of his own accord resolve to break his contract with his employer, there is here no conspiracy, although they may subsequently meet and communicate their determination to one another. But if before they have arrived at any such determination they meet and then agree that they will all break their contracts with the common employer, each of them by example, exhortation or concurrence incites the others to break their contracts also. Hence they are all engaged in a common purpose which is tortious, and their agreement to carry out this purpose is, apart from any statute, a criminal conspiracy.

(ii.) Either party to a contract is always at liberty to put an end to the contract by giving proper notice or by any other agreed method. To terminate a contract thus is no breach of it. Hence, to advise another to terminate his contract by giving proper notice is no tort. Therefore an agreement by two or more to induce others thus to terminate their contracts is *primâ facie* no crime, for it amounts only to persuading a man to do that which he has a perfect right to do. Moreover, the motive with which an act lawful in itself is done is immaterial. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[3]

And yet obviously there are cases, in which great mischief might be done, if this rule were strictly adhered to. Suppose several persons combine to do all in their power to persuade the workmen at a certain factory simultaneously to give notice that they will stop work at the earliest legal opportunity. Very few workmen are engaged for more than a week at a time; many only work by the day or the hour. Hence a widespread combination might close the works on very short notice without any breach of contract being committed, and yet with results disastrous to the community. It was therefore contended with much force that if such a combination were made without any just occasion or excuse, it ought in some way to be punished. The law on this point is not yet settled, except in the case of a trade dispute—an exception which practically covers all serious cases in which the point is likely to arise. If such a combination be made "in contemplation or furtherance of a trade dispute," it is, as we have seen, no crime, unless recourse be had to violence, intimidation or other unlawful means.

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[1] *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333; *National Phonograph Co., Ltd.* v. *Edison Bell, &c., Co., Ltd.*, [1908] 1 Ch. 335.

[2] *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239.

[3] *Per* Parke, B., in *Stevenson* v. *Newnham* (1853), 13 C. B. 297, cited with approval by Lord Macnaghten in *Quinn* v. *Leathem*, [1901] A. C. at p. 508.

(iii.) Lastly comes a question, upon which there has been even greater difference of opinion. Is it in any case a crime for A. and B. to agree together not to enter into any contracts with C., and to induce X. and Y. to do the same?

For one man to refuse to enter into a contract with any one else is no crime and no tort. Equally clearly it is no breach of contract. It is true, as Lord Macnaghten says in *Quinn* v. *Leathem*,[1] that "it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference." But in the case we are now discussing there are as yet no contractual relations in existence to be interfered with. Again, for one man to induce another not to enter into a contract with any one else is no crime, no tort and no breach of contract. It is only where the number of persons implicated is increased that any possibility of a legal wrong arises.

Can it be said, then, that it is in any case unlawful for two or more men to combine together to do an act, which is lawful when done by one man alone? This question has been repeatedly discussed, but it is not yet definitely decided. Darling, J., held in *Huttley* v. *Simmons and others*,[2] that it cannot be a tort for two or more persons merely to combine to do an act, which, if done by one person, would be neither a tort nor a crime. The correctness of this decision, however, has been questioned.[1] And even if it be good law, it does not necessarily follow that such a combination is no crime; for a crime need not always be also a tort. The interests of the community—nay, even the safety of the public—may in some cases require that such a combination should be sternly repressed, even though no action for damages could be founded upon it. No one, it is true, is bound to work for or deal with a particular person; he may lawfully refuse to enter into any such contract. But if a large number of persons, without any sufficient justification, agree together that they will not enter into any contracts with some unpopular person —will not supply him or his family with the necessaries of life—this is a criminal conspiracy; it is the crime of "boycotting." For several persons out of express malice towards one man to agree together to induce many others not to enter into contracts with him is a crime; for though the victim of the conspiracy may be a match for one man, he cannot successfully contend against a combination of many men.[2]

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[1] [1901] A. C. at p. 510.
[2] [1898] 1 Q. B. 181.

That such a crime exists is clear; but its nature and extent are ill-defined. The following points, however, appear to be well settled:—

If A. and B. agree together to advise X. and Y. not to enter into any contracts with C., and do so *bonâ fide* for the good of X. and Y., giving them advice which they honestly believe to be in the best interests of X. and Y., this is clearly no crime; for there is neither *actus reus*, nor *mens rea*. This will be so whenever A. and B. can show any sufficient justification or excuse for their interference in the private concerns of X. and Y. Friendly advice is no crime, even though it cause damage to a third person.

Again—though this is not quite so clear—there is no crime where the interference of A. and B. is caused by motives of self-interest. Competition between rival traders is allowed to any extent, if only lawful means are employed.

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[1] See *post*, pp. 631, 632.

[2] See the judgment of Lord Bramwell in *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. at p. 45, and of Lord Brampton in *Quinn* v. *Leathem*, [1901] A. C. at p. 531.

So long as neither force nor threats of violence are used,[1] it is no tort, and—in most cases at all events—no crime, for two or more, from motives of self-interest, to agree together to induce others not to enter into contracts with a rival trader; for self-interest is not malice. It is not clear, however, that this rule applies in its entirety to cases of criminal conspiracy. The remarks of Bowen, L. J., in *Mogul Steamship Co.* v. *McGregor*,[2] suggest that an agreement of the kind, which the Court in this case declared not to be actionable, might nevertheless in some cases be held to amount to an indictable conspiracy on the ground of obvious and excessive inconvenience.

And even where the action of the defendant is dictated neither by motives of self-interest nor of friendship for X. and Y., nevertheless, if the conspiracy be entered into in contemplation or furtherance of a trade dispute, it is, as we have seen, no crime, unless A. and B. intended to have recourse to violence and intimidation, or unless such was the natural consequence of their acts. The Legislature apparently considered a trade dispute a sufficient justification.

Boycotting, however, frequently arises from religious or political ill-feeling, in which no trade interests are concerned.[3] And here it would seem that we have arrived at an instance of a criminal conspiracy arising out of acts, which in themselves would be innocent if done by one man without preconcert with others. The parties engaged in it must be numerous; they must be actuated by motives of spite and ill-will against the person boycotted. Their conduct must be calculated to do him and his family serious and substantial damage; and the result of the combination must, it is submitted, be such as to cause some mischief or inconvenience to the public generally or to a portion of the public; otherwise the conspiracy is no crime.[4]

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[1] *Tarleton and others* v. *McGawley* (1794), Peake, 270; *Young* v. *Hickens* (1844), 6 Q. B. 606; *Pudsey Coal Gas Co.* v. *Bradford Corporation* (1873), L. R. 15 Eq. 167.

[2] (1889), 23 Q. B. D. at p. 618. Nevertheless, the decisions in this case and in *Allen* v. *Flood*, [1898] A. C. 1, undoubtedly restrict to some extent the ruling of Erle, J., in *R.* v. *Rowlands* (1851), 17 Q. B. 671.

[3] *Sweeney* v. *Coote*, [1906] 1 I. R. 51; [1907] A. C. 221.

[4] See *R.* v. *Rowlands* (1851), 17 Q. B. 671; *R.* v. *Parnell* (1881), 14 Cox, 505; *O'Connell* v. *R.* (1843), 5 St. Tr. (N. S.) 1; 1 Cox, 413.

BOOK II.—PART III.

OFFENCES AGAINST THE PERSON.

CHAPTER I.

HOMICIDE, OR CAUSING DEATH.

THE law of England recognises (independently of the crime of suicide) two degrees of culpable homicide, murder and manslaughter; it recognises also two degrees of homicide—excusable and justifiable—which do not expose to punishment. But in all these cases the first question always is: Did the prisoner cause the death of the deceased? If not, there is no homicide.

Homicide occurs when one human being causes the death of another. That other may be an alien, an outlaw, or a person subject to the pains and penalties of a *præmunire.* "Killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder."[1] But the person killed must have a separate existence; he must have been completely born; it is not homicide to kill a babe whilst it is being born;[2] still less while it is *en ventre sa mere.* The whole body of the babe must have emerged from the body of the mother; else it is not born. And it must be born alive. A babe must be proved to have breathed by the natural movement of its own lungs before it can be the subject of homicide; the fact that the child cried is generally accepted as sufficient evidence of this. And if after the child has thus attained a separate existence it dies from injuries inflicted before or during its birth, this will be homicide.

But the phrase "causing death" requires some further explanation; there are many cases in which in ordinary parlance we should say that one man had caused the death of another, but in which the law would place a different construction on the facts.

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[1] 1 Hale, 433.

[2] *R.* v. *Poulton* (1832), 5 C. & P. 329; *R.* v. *Brain* (1834), 6 C. & P. 349.

The prisoner's act must be the direct cause of the death. If it be only one of several causes, which together bring about the death, it will be deemed too remote.

Thus where a man seized by the hair a woman, who was nursing a child of four and a half years old, and struck her in such a manner as to frighten the child and bring on convulsions from which it ultimately died, Denman, J., directed the jury that, if they were of opinion that the assault was the direct cause of the infant's death, it would be manslaughter, but that should they consider that the death was not caused by the assault but by a combination of other circumstances, it would be accidental death only. The jury found that the assault was the direct cause of the death and convicted the prisoner of manslaughter.[1]

Where a fireman absented himself from his post and therefore failed to send the engine to a fire, which resulted in a loss of life, it was held that he had not caused the death.[2] So, too, trustees appointed to repair roads under a local Act were held not to have caused the death of a man, who lost his life in consequence of the roads being out of repair through the neglect of the trustees.[3]

It is immaterial that any act or negligence on the part of the deceased was one of the circumstances which led up to his own death, if the direct cause of the death was the act of the prisoner. But if the deceased was a free agent in the matter and his death was the direct result of some voluntary and spontaneous act of his own, neither instigated nor compelled by the prisoner, the deceased has caused his own death, although something said or done by the prisoner may have led up to the fatal act or even suggested it to him.[4]

Thus in the well-known case of *R.* v. *Swindall and Osborne*,[5] the prisoners were racing each other in their carts along a road at night and ran over the deceased, who was lying drunk in the road. But this fact did not afford them any defence, when charged with causing his death. In his summing up, Pollock, C. B., said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct. If they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death ; for in this consists a great distinction between civil and criminal proceedings."

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[1] *R.* v. *Towers* (1874), 12 Cox, 530.

[2] Cf. *R.* v. *Hilton* (1837), 2 Lewin, 214; *R.* v. *Lowe* (1850), 3 C. & K. 123.

[3] *R.* v. *Pocock* (1851), 17 Q. B. 34, 39.

[4] *R.* v. *Martin* (1827), 3 C. & P. 211.

[5] (1846), 2 C. & K. 230; 2 Cox, 141. And see *R.* v. *Jones* (1870), 11 Cox, 544; *R.* v. *Kew* (1872), 12 Cox, 355; *Blenkinsop* v. *Ogden*, [1898] 1 Q. B. 783.

A. determined to commit suicide and therefore bought poison from a chemist. The chemist asked no questions as to A.'s object in purchasing the poison. A. took the poison and died. The chemist has not caused A.'s death.

If a maidservant, who has free control of her actions and is able to take care of herself, remains in a service where she is starved and badly lodged, the mistress will not be criminally responsible if death ensues ; it would be the result of the servant's own folly in remaining there.[1]

But it is not always necessary that death should be caused by an act. Neglect of a legal duty, which the prisoner owes to the deceased, may be sufficient to render him criminally responsible for the death. Whenever the law imposes a duty tending to the preservation of life, or where such a duty has been undertaken by contract or conduct, omission to perform the acts required by that duty will be held a cause of death, if death ensues. It lies on the prosecution to prove that the death was the result of the omission.[2]

Thus, a father is bound to provide food and clothing for his child, and his omission to do so, or his omission to notify the proper authorities if he is unable to do so, will be held a cause of death, if the child dies from neglect.[3] And where the prisoner persuaded an infirm old woman to live in his house and failed to provide her with food and fire (which she was incapable of providing for herself), he was held to have caused her death, when she died from neglect.[4] So, where any one undertakes the charge of an imbecile or idiot incapable of looking after himself.[5] A signalman, who negligently omits to change the points with the result that a fatal collision ensues, will have caused death ; though if no one be killed, he will have committed no crime at common law in having merely endangered human life.[6] The duty must be a legal one. A man commits no crime, if he abstains from rescuing another from drowning, even though he might have done so without risk or serious inconvenience to himself ; he merely disregards a moral duty. So, if a man omits to supply food or medical assistance when he is under no legal duty to do so.[7]

But, apart from such cases of neglect of duty, it would seem that the law requires that the death must be caused either by administering or applying something, or by some kind of physical contact on the part of the prisoner or some agent of his.

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[1] *Per* Erle, C. J., in *R.* v. *Smith* (1865), L. & C. at p. 625.

[2] *R.* v. *Morby* (1882), 8 Q. B. D. 571.

[3] *R.* v. *Senior*, [1899] 1 Q. B. 283 ; Children Act, 1908, s. 12, *post*, p. 310.

[4] *R.* v. *Marriott* (1838), 8 C. & P. 425 ; *R.* v. *Instan*, [1893] 1 Q. B. 450.

[5] *R.* v. *Nicholls* (1874), 13 Cox, 75.

[6] The offence is, however, covered by statute : see 3 & 4 Vict. c. 97, s. 13, and 24 & 25 Vict. c. 100, s. 34.

[7] *R.* v. *Shepherd* (1862), 31 L. J. M. C. 102.

Thus, where a man procured the death of another by falsely accusing him of a capital crime and giving perjured evidence to support his charge, he was held not to have caused the death.[1] So, if a man sent an alarming telegram to a woman who had a weak heart, and she died from the shock, he has not caused her death.[2]

But where there is any direct physical impact which does cause death, the fact that such a result was highly improbable and could not reasonably have been anticipated by the actor, is in law immaterial. An impact, which in the ordinary course of things could not possibly prove fatal, may yet cause death, if the person struck be in a morbid condition; and the person striking the blow will be guilty of homicide, although he was not aware of the condition of health of the deceased. Every man is liable for the natural and necessary consequences of any unlawful act done by him, although he could not have foreseen them,[3] but not for consequences which are merely accidental.[4] The death must be occasioned by the prisoner's act; but it does not matter that the deceased was at the moment of that act in such a state of health that his death must inevitably have occurred shortly afterwards; it is sufficient if the prisoner's act accelerated the death by a single day or hour.[5]

If the prisoner accelerated the death of his child by inflicting injuries upon it at any period during the twelvemonth before its death, "the fact that the child was already suffering from meningitis, from which it would in any event have died before long, would afford no answer to the charge of causing its death."[6]

That subsequent exposure to accident, cold or other natural causes was the direct cause of death is immaterial, if it was the prisoner's act which exposed the deceased to the operation of such natural causes or rendered him defenceless against such accident.

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[1] *R.* v. *MacDaniel and others* (1756), 19 St. Tr. 745, 810—4 (n.).

[2] See Fitzjames Stephen's History of the Criminal Law, Vol. III., p. 5, where this point is discussed.

[3] *R.* v. *Lumley* (1912), 22 Cox, 635.

[4] *R.* v. *Davies* (*No.* 2) (1913), 29 Times L. R. 350.

[5] See the summing up of Parke, J., in *R.* v. *Martin* (1832), 5 C. & P. at p. 130; and *R.* v. *Instan*, [1893] 1 Q. B. 450.

[6] *Per* Lord Alverstone, C. J., in *R.* v. *Dyson*, [1908] 2 K. B. at p. 457.

Thus a woman, who left her baby in an orchard and covered it with leaves and it died in consequence of being struck by a kite, was deemed to have caused its death.[1] Again, where on a winter night the prisoner knocked a man down and left him lying unconscious and he died from exposure, it was held that the prisoner caused the death. So where a son hurried his sick and aged father in cold weather from town to town, and thereby hastened his death, he was held to have caused his death.[2] Where a woman with intent to procure abortion caused a child to be born so prematurely that it could not possibly live, she was held to have caused its death.[3]

If the prisoner caused A. to do an act which causes A.'s death, he has caused A.'s death, unless, as we have seen,[4] A. was a free agent in the matter.

Thus, if B. makes repeated thrusts at A. with a sword and forces him to retreat backwards, till he falls over a precipice and is killed, B. has caused A.'s death.[5] Again, if a man makes a forcible attack on a woman's chastity, and her only means of escape is to leap from an open window, he is guilty of murder, if she be killed.[6] So, if A. by violence or threats of violence compels B. to throw himself into a river, or to leap from a train in motion, with the result that B. loses his life, A. has caused B.'s death, provided B. reasonably believed that his life was in danger and saw no other means of escape. But A.'s liability will depend on whether a man of ordinary self-control or only a man unreasonably timid would have acted as B. did.[7] On the other hand, if a husband quarrel with his wife and she drown herself in consequence of the mental worry occasioned by such quarrel, the husband has not caused her death. So, if A. and B. play cards for high stakes, and B. is utterly ruined and commits suicide in despair, A. cannot be said to have caused B.'s death.

That any imprudent conduct on the part of the deceased, or any honest mistake committed by a properly qualified medical man employed by him, was the cause of death is immaterial, if it was the act of the prisoner which reduced the deceased to such a condition that it was necessary to take some decisive step, and placed on the deceased or his medical man the necessity of deciding what step must be taken. If the prisoner by his criminal conduct has imposed upon his victim the serious responsibility of deciding what may be a question of life or death, *e.g.*, whether he will submit to an operation or not, he is equally liable, whichever way the question is decided.

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[1] *The Harlot's Case* (1560), Crompton's Justice, 24 ; 1 Hale, 431 ; and see *R.* v. *Walters* (1841), Car. & M. 164.

[2] *Anon.* (1328), Kenny's Select Cases, 92 ; 1 Hale, 431.

[3] *R.* v. *West* (1848), 2 C. & K. 784.

[4] *Ante*, p. 267.

[5] *R.* v. *Pitts* (1842), Car. & M. 284.

[6] Cf. *R.* v. *Halliday* (1889), 61 L. T. 699.

[7] *R.* v. *Evans* (1812), 2 Russell on Crimes, 7th ed., 666 ; followed in *R.* v. *Grimes* (1894), 15 N. S. W. L. R. 209. See *R.* v. *Monks* (1870), 72 C. C. C. Sess. Papers, 424.

Thus A. was deemed to have caused B.'s death in each of the following cases :—

A. violently assaulted B., who died, though he might have recovered if he had followed the advice of his doctor and foregone his daily glass of beer.[1]

A. wounded B. so severely that it was necessary for B. to have the assistance of a medical man. B. did not call in a medical man and died in consequence.[2]

A. wounded B. so severely that it was necessary for B. to have the assistance of a medical man. B. did call in a qualified medical man, who was guilty of some negligent but unintentional blunder which caused B.'s death.[3]

A. wounded B. severely. Gangrene or blood poisoning resulted from neglect or unskilful treatment, and B. died in consequence.[4]

A. wounded B. so severely that it was necessary for B. to have the assistance of a medical man. The medical man advised an operation. B. refused to undergo the operation and died in consequence.[5]

On the other hand :—

A. wounded B. so severely that it was necessary for B. to have the assistance of a medical man. B., against such medical man's advice, insists upon an operation. A. will not be liable, unless the prosecution can prove that B.'s death was due to the prisoner's act and not to the operation.[6]

A. wounded B. so severely that it was necessary for him to call in a medical man. If B., instead of taking the advice of a qualified medical man, calls in some unqualified quack, who prescribes wrong treatment or operates unnecessarily or improperly and so causes the death of B., A. will not be liable. It would be otherwise, if the quack did nothing which contributed to cause the death.[6]

Where death results from a joint act, all the actors are principals in the first degree. For if two men agree together to jointly commit or attempt to commit any crime, each is liable for all that the other does in furtherance of their common purpose, though not for any act done by the other which is outside that purpose.[1] Thus where two carters, racing each other along a road, ran over a man and death ensued, it was held that both of them had caused the death and were therefore equally guilty, although it was not known whether both or one only had actually run over the deceased.[2] And whenever two or more persons act in concert with a common purpose which is criminal, each is liable for every act done by any of the others in pursuance of that common purpose.

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[1] See *R.* v. *Wall* (1802), 28 St. Tr. 51.

[2] *Rew's Case* (1662), Kelyng, 26.

[3] *R.* v. *Pym* (1846), 1 Cox, 339.

[4] See *R.* v. *Flynn* (1868), 16 W. R. 319 (Ir.).

[5] *R.* v. *Holland* (1841), 2 M. & Rob. 351.

[6] 1 Hale, 428 ; and see *R.* v. *Davis* (1883), 15 Cox, 174.

If the prisoner employs an agent, whether innocent or guilty, to carry out his design, and death ensues from the act of such agent, the prisoner has caused the death. This is so even where the agent mistakes or exceeds his instructions, provided such mistake or excess was the necessary or reasonable consequence of the instructions which the prisoner gave him.

Thus, where a cook poisoned her master's dinner and sent it to him in the hayfield by the hand of his little daughter aged six, it was held that the cook was a principal in the first degree and had caused the death of her master.[3] So, where A. poisoned an apple and gave it to his wife to eat, and she in A.'s presence gave it to their son, who ate it and died, it was held that A. had caused the death of his son.[4]

If the prisoner incites or commands a third person to do a criminal act which would not cause death, and he commits a different and independent crime which does cause death, the prisoner is not liable, unless the crime actually committed is the natural or probable consequence of the crime which the prisoner instigated him to commit.

Thus, if the prisoner incites an agent to kill A. by one method and the agent kills A. by another method, the prisoner is liable; for he has caused the death of A. Again, where the prisoner instigates an agent to murder a third person, whom he describes, and the agent, by a reasonable mistake, murders some quite different person who corresponds to the description, the prisoner has caused the death of the man his agent has killed. Where the prisoner incites an agent to rob A., and A. when attacked resists and a fight ensues in the course of which A. is mortally wounded, the prisoner has caused A.'s death; for A.'s resistance and death are the natural consequences of the attempt to rob him, which the prisoner had directly instigated.

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[1] See *R.* v. *Franz* (1861), 2 F. & F. 580.

[2] *R.* v. *Swindall and Osborne* (1846), 2 C. & K. 230; 2 Cox, 141; and see *R.* v. *Salmon and others* (1880), 6 Q. B. D. 79, *post*, p. 296.

[3] *Anon.* (1633), Kelyng, 52.

[4] *R.* v. *Saunders and Archer* (1573), Plowd. 473; Foster's Crown Cases, 371.

It is also necessary to prove that the deceased died within a year and a day after the prisoner's act, which caused the death. If a longer time elapses, the law will presume that the death was due to some other cause.[1]

Homicide is of four kinds:—

(1) Murder; where a man unlawfully causes the death of another with malice aforethought, express or implied.

(2) Manslaughter; where a man unlawfully causes the death of another, but without malice aforethought, express or implied.

(3) Justifiable; where death is lawfully inflicted.

(4) Excusable; where death is accidental.

In class (3) the death is always intentional, in class (1) it is almost always so, in class (4) it is always unintentional; in manslaughter it may be either intentional or unintentional; the prisoner may have intended to kill the deceased, but under great provocation; or he may have caused the death involuntarily, while doing an unlawful act, or doing a lawful act negligently.

Murder and manslaughter are both felonies;[2] they will be dealt with in Chapters II. and III. Non-felonious homicide is discussed in Chapter IV.

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[1] *R.* v. *Dyson*, [1908] 2 K. B. 454. "In computing the period, the day on which the injury is inflicted is to be counted as the first day:" Fitzjames Stephen's Digest of the Criminal Law, 6th ed., Article 242.

[2] See indictments, Nos. 19—21, in the Appendix.

CHAPTER II.

MURDER.

EVERY homicide is *primâ facie* murder; for every man is presumed to have known and to have intended the natural and necessary consequences of his act. It lies on the accused, therefore, to reduce his offence from murder to manslaughter, or to excuse or justify it. "When any man takes away the life of another, the law presumes that he did it of malice aforethought, unless there be evidence to show the contrary."[1] "Where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character and does not amount to the crime of murder."[2] Hence it is for the person, who is proved to have caused the death of another, to bring forward evidence of any facts on which he relies to reduce the crime from murder to any lesser degree of homicide. If such evidence be tendered, it is for the jury to decide whether the facts alleged did really occur. On these facts, assuming them to have occurred, it is for the judge to direct the jury whether the prisoner should be convicted of murder or manslaughter, or is entitled to be acquitted altogether. In cases of doubt or difficulty, the jury may state the facts and circumstances in a special verdict, as they did in the case of shipwrecked mariners who killed a boy to preserve their own lives.[3]

If any man unlawfully causes the death of another with malice aforethought express or implied, he is guilty of the felony of murder, and must be sentenced to death.[1] This crime cannot be tried at Quarter Sessions. The gist of the offence is the presence of "malice aforethought express or implied." If this be absent, the crime cannot be more than manslaughter.

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[1] *Per* Rolfe, B., in *R.* v. *Kelly* (1848), 2 C. & K. at p. 815.
[2] *Per* Tindal, C. J., in *R.* v. *Greenacre* (1837), 8 C. & P. at p. 42.
[3] *R.* v. *Dudley and Stephens* (1884), 14 Q. B. D. 273.

On an indictment for murder the jury may convict the prisoner of manslaughter; and it is the duty of the judge to inform the jury that they have power to do so, if they think it right, provided there are facts and circumstances which would justify them in so doing; and this is so "whatever the line of defence adopted by counsel" for the prisoner.[2] On this indictment also, if the victim be a child recently born, the prisoner can by special statute be convicted of the misdemeanour of concealment of birth.[3]

The prosecution has in the first place to prove that the prisoner caused the death of the deceased within the meaning of the rules laid down in the preceding chapter. As soon as this is established, it will by a well-known rule of law be presumed that the prisoner intended to cause that death. Hence the burden of proving that he did not in fact so intend lies strictly on him. But in actual practice the prosecution usually accepts the *onus* of proving malice aforethought, instead of calling upon the prisoner to disprove it.

What then is "malice aforethought"? The phrase, in its original and only proper meaning, signifies this—that the prisoner, before he struck the blow or did whatever other act caused the death, had conceived the deliberate intention of killing some one. It is not essential that the prisoner should bear personal ill-will or hatred against his victim. Thus—

if A. deliberately intended to kill B. and does so;

if A. deliberately intended to kill B. and kills C. in mistake for B.;

if A. deliberately intended to kill the first man he might meet, and does so;

in all three cases he is clearly guilty of causing death with express malice aforethought.

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[1] This is so, although the jury may have strongly recommended the prisoner to mercy, and although the judge is sure that the death penalty will not be inflicted. Since 1868 the execution must take place within the prison and in the presence only of such persons as the sheriff may think it right to admit (31 & 32 Vict. c. 24, s. 2).

[2] *R.* v. *Hopper*, [1915] 2 K. B 431, 435.

[3] 24 & 25 Vict. c. 100, s. 60

If A. shoots at a man who is approaching him because he believes him to be his enemy B. and kills him, he is guilty of murder, although he subsequently discovers that the man whom he has killed is his friend C., or an entire stranger. Such a mistake of identity makes no difference in the quality and magnitude of the offence or in the amount of punishment due to it. A. does in fact intend to kill the man whom he sees approaching him; and the fact that he erroneously believes him to be B. is immaterial.

So where A. poisoned food and laid it where he thought B. would find it and eat it, but C., against whom A. had no ill-will, saw it first, ate it and died, A. was held guilty of murder.

A. incites B. to kill C., a person unknown to B. A. describes C. to B. and tells him where he will probably find C. at a certain hour. B. goes to that place at that hour and kills D., who answers to the description which A. gave of C. A. is an accessory before the fact to the murder of D.

A fugitive felon being pursued by the police enters a cottage and barricades the door; he declares that he will shoot the first man who enters the cottage and does so, not knowing or caring who it is. He is guilty of murder, for he has caused death with malice aforethought; it is not necessary that the intention to kill should have been for any length of time preconceived.

If a criminal resists capture by an officer of justice, and kills him in order to escape, although he knows that he is an officer engaged in executing his office, the criminal is guilty of murder; for his act makes it clear that he intended to kill the officer if he could not otherwise succeed in escaping.[1]

It is in every case for the jury to determine whether the prisoner intended to kill or not. In most cases they can look only at his acts or words, and infer from them his inward intent. In some cases the existence of circumstances which suggest a possible motive may be material. In all cases the absence of any motive whatever for the crime will tell strongly in the prisoner's favour. Any words which amount to a threat to kill the deceased will also be material,[2] unless they were spoken in great excitement or under the influence of drink or were merely vulgar abuse. A man's acts, however, are the best index to his intention. And whenever it is sought to convict a man of murder by purely circumstantial evidence, such evidence ought to be practically conclusive.[3]

It is a well-known rule of our law that every man must be presumed to know and to intend the natural and ordinary consequences of his acts; and he is liable for all such consequences, even though he never intended or contemplated that they would follow. This presumption is no doubt rebuttable in certain cases.[1] But if a man is aware that certain consequences will probably follow the act which he contemplates and yet deliberately proceeds to do that act, he must be taken to have intended those consequences to follow, even though he may have hoped that they would not.

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[1] See 1 Russell on Crimes, 7th ed., pp. 721—728.

[2] As, for instance, "You've got to die," in *R.* v. *Linneker,* [1906] 2 K. B. 99.

[3] *R.* v. *Franz* (1861), 2 F. & F. at p. 583.

If A. presents a loaded revolver at B.'s head and pulls the trigger, it is an almost irresistible inference from these facts that A. intended to kill B. Nor will the mere fact that he did not know for certain and took no pains to ascertain whether the revolver was loaded or not, in any way excuse the act.

But the inference may be rebutted by clear proof that A. honestly and on good grounds believed that the revolver was unloaded. Take, for instance, the case reported by Foster, J.[2]:—A. went one Sunday with his wife to have dinner at a friend's house. Before entering the house he discharged his gun. During his visit his friend's son, going out shooting, took A.'s gun and on his return replaced it loaded where he had found it. A. afterwards returned home with his wife, taking his gun with him, and feeling certain that it was unloaded, presented it at his wife, pressed the trigger and to his horror shot his wife dead. He was acquitted; for, on the facts as known to him, it was impossible that his act should cause death.

Again, where the accused was drunk at the time when he struck the fatal blow, the condition of his mind may be urged upon the jury as a ground for reducing the crime to manslaughter; for it lessens the probability that he had formed any intention to kill. The presumption of such an intention drawn from his act will be rebutted by proof that he was in such a state of drunkenness that he was incapable of forming any such intention.[3] It is not necessary for him to prove that his state of mind was one bordering on insanity. On the other hand, it is no defence to prove merely that he was drunk. It must be shown "that his mind is so affected by the drink he has taken that he is incapable of knowing that what he is doing is dangerous, *i.e.*, likely to inflict serious injury."[4]

But cases may arise in which it is quite clear that as a matter of fact the prisoner did not intend to cause death or grievous bodily harm to any one. Nevertheless, as the law stands at present, he may be found guilty of murder in a few such cases, and then malice aforethought is said to be implied. These are known as cases of "constructive murder," and in them the term malice aforethought takes a wider meaning. The law on the point is not quite clear, but it may be stated thus:—

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[1] *Per cur.* in *R.* v. *Meade,* [1909] 1 K. B. at p. 899; and see *ante,* p. 116.

[2] *Anon.* (1750 *circâ*), Foster's Crown Cases, 265.

[3] *R.* v. *Grindley* (1819), 1 Russell on Crimes, 7th ed., 88 (b); *R.* v. *Doherty* (1887), 16 Cox, 306.

[4] *Per cur.* in *R.* v. *Meade, supra;* and see *R.* v. *Beard* (1919), 14 Cr. App. Rep. 110, and (H.L.) *The Times,* March 6th, 1920.

Malice aforethought will be implied as a matter of law, not as an inference of fact, whenever the following circumstances concur:—

(i.) the prisoner must intend to do an act which is either a felony or one of the graver misdemeanours;

(ii.) in the course of doing that act he must cause the death of a human being;

(iii.) he must have known or ought to have known that such consequence would necessarily or in all probability follow from his act; and

(iv.) if in spite of such knowledge or in disregard of the obvious facts he deliberately persists in his criminal design and death ensues, he is guilty of murder.

A. imprisoned his wealthy uncle, B., and kept him without food or drink for three days, hoping thus to force him to sign a deed conveying certain lands to A., which on B.'s death would otherwise pass to another nephew, C. B. refused to sign this deed, and eventually A. released him; for the last thing which A. desired was that B. should die before he had signed that deed. B. died of exhaustion caused by his imprisonment and starvation. A. has committed murder.

A young man, A., quarrelled with an experienced swordsman, B., and challenged him to fight a duel. Before the fight took place B. promised a friend of A.'s that he would not hurt A. seriously; he would "only give him a lesson." At the duel after some fencing, in which B. had A. entirely in his power, B. thrust at A.'s shoulder, but A. unfortunately shifted his position at that moment, and the sword pierced his throat and killed him. B. is guilty of murder.[1]

"Suppose that a man, intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. I think that every one would say in a case like that, that when a person began doing wicked acts for his own base purposes he risked his own life as well as that of others. That kind of crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol or a knife. If a man once begins attacking the human body in such a way, he must take the consequences if he goes further than he intended when he began."[2]

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[1] See *Errington's Case* (1838), 2 Lewin, 217.

[2] *Per* Stephen, J., in *R.* v. *Serné and Goldfinch* (1887), 16 Cox, at p. 313; and see *R.* v. *Lumley* (1912), 22 Cox, 635, *post*, p. 281.

But why should malice aforethought be implied from the concurrence of the four circumstances set out above? It is no longer a question of arguments *pro* and *con* on an issue of fact, Did the prisoner intend to kill a human being or did he not? It is admitted by the prosecution that he did not. He intended to do something quite different. But he intended to commit a serious crime, and a crime moreover of a kind which was likely to cause death or grievous bodily harm. These consequences he did not intend or desire; but he either was or ought to have been aware that such consequences would probably follow from the crime which he was about to commit. There is, therefore, in his mind the ordinary *mens rea*, the intention to commit a crime; and there is something more—recklessness or heedlessness as to the probable consequences of his act. Reckless indifference as to the consequences of a criminal act may, no doubt, be stigmatised as malice. But heedlessness is not malice, and neither of them surely amounts to malice aforethought. We venture therefore to state that in our opinion the law of constructive murder should be abolished, and the term "malice aforethought" restricted to cases in which the prisoner really intended to kill some one. No man should be hanged merely in obedience to a legal presumption.

In the last two centuries the law on this point was frequently laid down in terms more stringent than those stated above. Malice aforethought could according to these authorities be implied from the prisoner's intention to commit a felony, even though his act was not dangerous in itself and not likely to cause death or grievous bodily harm to any one. Lord Coke, indeed, had laid down a far wider rule, namely, "If the act be unlawful, it is murder."[1] He cited Bracton as his authority and gave as an instance of this rule the following example :—"If A. meaning to steale a deere in the park of B. shooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, for the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him. But this *dictum* was never followed. In favour of the prisoner the proposition was limited to felonious acts. If he intended to do an act which was a mere misdemeanour and in committing it unintentionally caused death, his crime was declared to be only manslaughter, even though its natural and probable consequence was death. An intention to commit any felony was regarded as malice aforethought; an intention to commit a misdemeanour was not.

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[1] 3 Co. Inst. 56; see the remarks of Blackburn, J., on this point in *R.* v. *Pembliton* (1874), L. R. 2 C. C. R. at p. 121.

In the days when the penalty for almost every felony was death, enormous importance was attached to the distinction between a felony and a misdemeanour. Yet surely the presence or absence of implied malice aforethought can no longer depend upon a distinction which now is merely technical. It seems monstrous to assert that the well-known phrase that the prisoner "did of his malice aforethought kill and murder J. S." can be taken to mean that the prisoner intended to steal the goods of A. B., and in stealing them accidentally killed J. S. Such killing clearly is not malicious.

Nevertheless, the proposition appears in many of the old books that, if one man in the course of committing any felony causes the death of another, though unintentionally and without criminal negligence, malice aforethought will be irrebuttably presumed and he must be convicted of murder; whereas, if the act which he was committing had been only a misdemeanour, he should be found guilty of manslaughter. No decision of any Court, however, is cited in these books as an authority for this proposition; nor is any reliable decision to be found earlier than 1762, the date of the first publication of Sir Michael Foster's Crown Cases.[1] The proposition, indeed, appears to have been founded upon the following passage in that book[2]:—"A. shooteth at the poultry of B. and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent." And this was copied over and over again as an unquestionable authority. But as a matter of fact it is in direct conflict with a statement by an earlier writer, who is of at least equal, if not of even greater, authority.[3] Sir Matthew Hale, C. J., in his Pleas of the Crown (written before 1676, but not published till 1736), lays it down that if A. threw "a stone to kill the poultry or cattle of B. and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful, but not murder, because he did it not maliciously or with an intent to hurt the by-stander."[4] The test in his judgment, then, is the presence of a malicious intent to hurt, and does not depend upon the distinction between a felony and a misdemeanour.

Many cases, moreover, can be found in the old books in which a prisoner, who had no intention to kill any one, was held to have committed murder, although his act which caused the death was not a felony but a misdemeanour. Thus a workman, who, without any warning to the people below, threw stones or rubbish from the top of a house into a public street at a time when he knew that it was crowded, was held guilty of murder.[1] So was a man, who rode his horse violently into the midst of a crowd for the fun of seeing them disperse in alarm and so unintentionally killed some one.[2] In both these cases, had no death ensued, the prisoner's act would at common law have been only a misdemeanour; and yet malice aforethought was implied.

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[1] Foster refers to the trial of Lord Morley (1666), reported in 6 St. Tr. at p. 770, for murder. But this case is no authority for the proposition; for Lord Morley, who had under great provocation fought a duel and killed his opponent, was acquitted of murder, but convicted of manslaughter. Foster also refers to Kelyng, at p. 117, which gives a very hesitating statement of the law.

[2] Discourse II., Of Homicide, pp. 258, 259.

[3] Sir Matthew Hale, born 1609, made Chief Justice of the King's Bench 1671, died 1676. Sir Michael Foster, born 1689, made a puisne Judge of the King's Bench 1745, died 1763.

[4] 1 Hale, 475. And see the discussion of this point, 3 F. & F. 288 (n.).

It is submitted, therefore, that it is no longer law that malice aforethought may be implied from the mere fact that the prisoner's act which caused the death was felonious.[3] Circumstances must also exist which show that the death was the natural or probable consequence of the prisoner's act, and that the prisoner knew or ought to have known that this was so. Some authority for this view will be found in the summing up of Stephen, J., in *R.* v. *Serné*,[4] in which he says:—"I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder."

The prisoner insured his house for a large amount and then set fire to it. Two of his little children were burnt to death. He was indicted for murder and acquitted, although his act was clearly felonious and directly caused the death of his children. He was subsequently indicted for arson and convicted.[5]

If a man causes the death of a woman by raping her, he will probably not be convicted of murder, unless the attack upon her chastity was conducted with such brutality and violence as shows that the prisoner was recklessly indifferent whether he killed her or not.[6] Again, more than one man has within living memory been hanged for causing the death of a woman by administering a drug or performing an operation upon her with intent to procure abortion.[7] But in a similar case in 1898, Bigham, J., told the jury that they might find the prisoner guilty of manslaughter, if they thought that he could not reasonably have expected death to result from his act.[8] And it has since been held by the Court of Criminal Appeal[9] that where a person feloniously uses an instrument or other means with intent to procure a miscarriage, and the woman dies in consequence of his felonious act, then, if when he did the act he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result, he is guilty of murder. But if when he did the act he had not at the time in contemplation, and could not as a reasonable man have contemplated, either of those consequences, he is guilty only of manslaughter.

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[1] *R.* v. *Hull* (1664), Kelyng, 40; but see *R.* v. *Fenton* (1830), 1 Lewin, 179.

[2] Cf. *R.* v. *Dant* (1865), L. & C. 567.

[3] Though this has, no doubt, been laid down as clear law in many cases; see, for instance, the summing up of Cockburn, C. J., in *R.* v. *Desmond, Barrett and others* (1868), *Times*, April 28th.

[4] (1887), 16 Cox, at p. 313.

[5] *R.* v. *Serné, suprà.* It is difficult to see why the prisoner was not on the first indictment convicted of manslaughter.

[6] *Ladd's Case* (1773), Leach, 96; see 3 F. & F. 290 (n.).

[7] *R.* v. *Russell* (1832), 1 Moo. C. C. 356; and see the opinion expressed by Erle, J., in *R.* v. *Gaylor* (1857), Dearsl. & B. at p. 293.

[8] *R.* v. *Whitmarsh* (1898), 62 J. P. 711.

[9] *R.* v. *Lumley* (1912), 22 Cox, 635.

It is no defence to an indictment for murder that the prisoner risked his own life, or that the deceased consented to expose himself to a similar risk. Thus, the facts that either party challenged the other to fight a duel, that the other accepted the challenge and met his antagonist at an agreed time and place, are immaterial, if either party was killed in the duel. Any one, who incites or encourages another to kill a third person or even to kill himself, is liable, if death ensues, as an accessory before the fact or, if present at the commission of the crime, as a principal in the second degree.

Where, upon a previous arrangement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty. With respect to others shown to be present, the question is, did they aid, assist, countenance or encourage the principals in their contest? Mere presence will not be sufficient; but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present, assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder.[1]

If one of the combatants at a prize-fight is killed, the surviving combatant, both seconds and the referee are indictable for manslaughter; so is any person who is present and encouraging the combatants.[2] But mere voluntary presence at such a fight does not necessarily render those present guilty as aiding and abetting unless they do something to incite or encourage the combatants.[3]

So, if two persons mutually agree to commit suicide together, and the means employed to produce death take effect upon one only, the survivor will, in point of law, be guilty of murder; for each intended that the other should die, and each incited the other to commit the crime by agreeing that he would himself commit suicide also.[4]

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[1] *R.* v. *Young and Webber* (1838), 8 C. & P. 644.

[2] *R.* v. *Murphy* (1833), 6 C. & P. 103.

[3] *R.* v. *Coney and others* (1882), 8 Q. B. D. 534.

[4] *R.* v. *Alison* (1838), 8 C. & P. 418; *R.* v. *Dyson* (1823), Russ. & Ry. 523. See also *R.* v. *Jessop* (1877), 16 Cox, 204.

The fact that the deceased contributed to his own death is, as we have seen, no defence.[1]

Any one, who is convicted of being either a principal in the second degree or an accessory before the fact to a murder, is deemed as guilty as the principal in the first degree and must also be sentenced to death. An accessory after the fact to murder may be sentenced to penal servitude for life.

An attempt to murder was a misdemeanour at common law, but it has been made a felony by statute and is now punishable with penal servitude for life.[2] A conspiracy or incitement to murder any person is a misdemeanour punishable with penal servitude for ten years. It is immaterial whether the person, whose life is thus threatened, is a British subject or not, or is within the King's dominions or not; but the conspiracy must take place in England.[3]

A murder is always triable in the county where it takes place,[4] and murder on a British ship on the high seas is triable in the county in which the ship first touched land. Murder committed by a British subject on any land abroad may be tried in this country.[5]

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[1] *Ante*, p. 267.
[2] 24 & 25 Vict. c. 100, ss. 11—15; see *post*, p. 305.
[3] *Ib.* s. 4; see *post*, p. 307.
[4] See *R.* v. *Bexley* (1906), 70 J. P. 263.
[5] See 24 & 25 Vict. c. 100, s. 9, and *ante*, pp. 137, 138.

CHAPTER III.

MANSLAUGHTER.

WHOEVER causes the death of another without malice aforethought, express or implied, is guilty of manslaughter, unless the circumstances excuse or justify the homicide. This is a felony, punishable in extreme cases with penal servitude for life. But it is a crime which involves very different degrees of culpability—in some cases closely approaching murder, in others being almost excusable. It cannot be tried at Quarter Sessions.

All that was said about causing the death of another in Chapter I. of this Book applies to manslaughter as well as to murder; the difference between these crimes turns on the presence or absence of malice aforethought. Let us assume, however, that there is no suggestion that the prisoner was actuated by malice aforethought. The prosecution must in the first place prove that the prisoner caused the death. Then it will lie on him to satisfy the jury either—

(i.) that, before he committed the fatal act, he had received from the deceased grave provocation, which deprived him for the moment of all power of self-control, or

(ii.) that he never had any intention of killing or injuring the deceased, but that the death was the result of an accident, or was caused by no criminal act or neglect on his part.

We may, therefore, treat the subject under two heads:—

I. Intentional homicide where grave provocation was given by the deceased.

II. Unintentional homicide, which occurs while the accused was engaged either in doing a criminal act or in negligently performing an act which is not criminal.

I. INTENTIONAL MANSLAUGHTER.

Cases have constantly occurred, in which death has been caused intentionally, but in circumstances which the law recognises as affording grave provocation to the accused. If, for instance, a sudden blow be struck and in the heat of the moment the blow be returned with fatal effect, the law will not deem this murder. For the presence of grave provocation rebuts any presumption of malice aforethought. The provocation, however, must be such as will produce ungovernable passion in a reasonable man and deprive him of his self-control. The fact that the accused is an excitable person, who flies into an ungovernable passion under very slight provocation, is immaterial if the jury find that a person of ordinary self-control would not have been so provoked.[1] If there be no sufficient provocation, every intentional homicide, which is not justifiable, is murder.

Except in very special circumstances, no mere words or gestures, however insulting, will amount to sufficient provocation ;[2] nor will a slight assault, such as a slap in the face with an open hand, or where a woman flung a ring in her lover's face.[3] But a trifling assault or battery, if accompanied by words of gross insult, may amount to sufficient provocation ; for example, where a woman spat in a man's face, using at the same time insulting words of the grossest description.[4] The mode of resentment must bear a reasonable proportion to the provocation received by the prisoner. Much depends, for instance, upon the instrument which caused the death ; if it were a deadly weapon, the provocation must be great indeed to reduce the offence to manslaughter ; but if the prisoner employed a weapon or other means not likely to produce death, a less serious degree of provocation will be sufficient.[5]

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[1] *R.* v. *Lesbini*, [1914] 3 K. B. 1116 ; and see *R.* v. *Welsh* (1869), 11 Cox, 336, 338, and *R.* v. *Alexander* (1913), 23 Cox, 604.

[2] *R.* v. *Welsh*, *suprà* ; see *R.* v. *Jones* (1908), 72 J. P. 215, and *R.* v. *Phillis* (1916), 32 Times L. R. 414.

[3] *R.* v. *Palmer*, [1913] 2 K. B. 29.

[4] *R.* v. *Smith* (1866), 4 F. & F. 1066 ; *R.* v. *Sherwood* (1844), 1 C. & K. 556.

[5] *R.* v. *Eagle* (1862), 2 F. & F. 827.

Thus, if A. uses provoking language or behaviour towards B. and B. strikes him, whereupon a combat ensues in which A. is killed, B. is guilty of manslaughter and not murder; for the affray was sudden, the parties fought upon equal terms, and in such combats, upon sudden quarrels, it matters not who gave the first blow.[1]

Where a woman struck a soldier in the face, and he thereupon drew his sword and ran her through, the provocation, coming from a woman, was deemed at first insufficient, and the judge directed the jury to return a verdict of murder. But on its subsequently appearing that the blow was struck with an iron patten, and was so severe as to leave a scar upon the prisoner's face, the judge told them that they might find the prisoner guilty of manslaughter.[2]

Again, a husband, who unexpectedly discovers his wife in the act of adultery, has sufficient provocation to reduce the immediate killing of the wife or paramour to manslaughter.[3] So where a man suddenly heard from his wife that she had committed adultery—a thing of which he had no previous suspicion—and he thereupon killed her, though in strict law this is murder, the judge allowed the jury to reduce it to manslaughter.[4] But this is an extreme case, and the doctrine enunciated in it will not be extended. Thus the Court has refused to follow it in the case of persons only engaged to be married[5] or of a woman living with a man as his wife.[6] *A fortiori* a mere threat of future adultery uttered by a wife will not be a sufficient provocation, nor an unfounded suspicion that the murdered man had committed adultery with the prisoner's wife.[7] And no neglect, however gross, by a mother of her household and maternal duties will be any excuse for the murder by the father of his suffering child.[8]

The employment of unlawful force by A. against B. or any unlawful arrest or imprisonment of B. by A. is provocation sufficient to reduce the subsequent killing of A. by B. (but by no one else) from murder to manslaughter.[9] The employment of lawful force against B. is in law no provocation, if B has reason to know that the force used against him is lawful.

If B. forcibly resists an officer of justice in the execution of his duty and thus causes his death, he is guilty of murder provided he knew that the other was an officer of justice and was then employed in the execution of his duty.[10] Excessive resistance even to an unlawful arrest is criminal, though it will not amount to murder;[1] if, therefore, the officer had no right to arrest B., killing him is at most manslaughter. But the illegal arrest of B., though a provocation to him, is in law no provocation to a friendly by-stander; hence if such by-stander were to kill the officer, his act would be murder.

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[1] Foster's Crown Cases, 295; *R.* v. *Lord Byron* (1765), 19 St. Tr. 1177.
[2] *R.* v. *Stedman* (1704), Foster's Crown Cases, 292.
[3] *R.* v. *Manning* (1672), Sir T. Raym. 212; *R.* v. *Pearson* (1835), 2 Lewin, 216.
[4] *R.* v. *Rothwell* (1871), 12 Cox, 145; *R.* v. *Jones* (1908), 72 J. P. 215.
[5] *R.* v. *Palmer*, [1913] 2 K. B. 29.
[6] *R.* v. *Greening*, [1913] 3 K. B. 846.
[7] *R.* v. *Birchall* (1913), 23 Cox, 579.
[8] *R.* v. *Simpson* (1915), 84 L. J. K. B. 1893.
[9] See *R.* v. *Stevenson* (1759), 19 St. Tr. 846.
[10] See *ante*, p. 276.

Although the provocation may be *primâ facie* sufficient to reduce the homicide from murder to manslaughter, yet if the retaliation be not immediate, the prisoner may still be found guilty of murder. If a person receives a blow and avenges it at once with any instrument which he may happen to have in his hand, then the offence will be only manslaughter, provided the fatal blow is the result of anger arising from the previous provocation. But if there was sufficient time between the provocation and the fatal blow for the prisoner to regain his self-control, or if his conduct in the interval shows method and deliberation, the crime will remain murder. "The circumstances of the case rebut the inference of malice, if they show that the blow was given in the heat of passion arising on a sudden provocation, and before the passion had time to cool."[2] But if the passion has had time to cool, it is as though no provocation had ever been offered.

Again, if there be evidence of express malice, the killing may be found murder, however great the provocation. In every case the question is: Was the prisoner deprived of his self-control? In answering that question the jury must have regard to all the circumstances of the case.[3] If, for instance, the prisoner himself contrived to bring about the provocation, he cannot rely upon it as a defence; indeed, the manufacture of such a provocation is in itself evidence of malice aforethought, as it shows a deliberate intention to kill.

If A. and B. are fighting with fists and B., who is getting the worst of it, takes up a knife which happens to be lying on a table close by, and stabs A., this will be manslaughter only, because the knife was lifted in the heat of the moment. But if B., after getting the worst of the fight, left the room and went to his own house and fetched a knife, and then returned and stabbed A., this would be murder; for B. had time to regain his self-control, and the deliberate act of returning to A.'s house with the knife is evidence of malice.[1]

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[1] *R.* v. *Carey* (1878), 14 Cox, 214.
[2] *Per* Erle, C. J., in *R.* v. *Eagle* (1862), 2 F. & F. at p. 830.
[3] See *ante,* p. 285.

Where B., who is armed, enters into a contest with A., who is unarmed, and where in any other way B. fights under an unfair advantage, it will be murder if A. is killed; the fact that blows had been interchanged will not in such circumstances reduce the crime to manslaughter. So where two officers, who have been drinking, quarrel, and one of them draws a sword and kills the other before he can draw and get on his guard, there is evidence of malice to justify the jury in finding the aggressor guilty of murder.[2]

II. UNINTENTIONAL MANSLAUGHTER.

This is of two kinds:—

(a) Where the prisoner does a criminal act and in so doing unintentionally causes death.

(b) Where the prisoner does an act which is not in itself criminal, but does it so negligently that it causes death.

(a) *Criminal act or omission, causing Death.*

Where the prisoner commits a crime and thereby causes death, he is guilty of manslaughter at the least. It is not necessary that he should intend to cause death, or that he should know that his criminal act was likely to cause death; it is enough that it does cause death. If his act was such that it would probably cause death, and the prisoner knew this and yet deliberately persisted in doing that criminal act, such reckless indifference to the probable results of his criminal design would be deemed to amount to malice, and in strict law he would be guilty of murder. If on the other hand his act was one which was at all likely to cause death, and the prisoner ought to have known this, but through blundering heedlessness did not know it, and did the act, then, whether the act be in itself criminal or not, the prisoner is guilty of manslaughter under the next section of this chapter; for he has acted with criminal negligence. But, in the class of cases which we are now discussing, it is enough that the act which the prisoner does is criminal in itself—*i.e.*, that it would be a crime even if no fatal results had followed. A man who does such an act must take the risks of all its consequences, and if fatal results do follow he is guilty of manslaughter, although there was no criminal negligence on his part and no intention in his mind to kill any one. The facts that the prisoner's act was not in ordinary circumstances likely to cause death, or that it was only by accident that death resulted in the particular case, are immaterial if the act which the prisoner intended to do was in itself a crime.

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[1] *R.* v. *Mason* (1756), Foster's Crown Cases, 132; *R.* v. *Hayward* (1833), 6 C. & P. 157.

[2] *Per* Bayley, J., in *R.* v. *Whiteley* (1829), 1 Lewin, at p. 176.

Thus, if A. is a member of an unlawful assembly or of a mob of rioters and does some act in furtherance of their common unlawful purpose which accidentally causes the death of an unoffending by-stander, he is guilty of manslaughter.[1]

Where A. strikes B. intentionally and without any sufficient excuse, meaning only to inflict some trifling and temporary pain (as in a prize-fight[2] or in an unlawful game[3]), and death unexpectedly results, A. is guilty of manslaughter, for he intended to commit a battery, and a battery is a crime.

If A., finding a trespasser upon his land, beats and thus chances to kill him he is guilty of manslaughter; or if there be circumstances evidencing malice, he may be convicted of murder. This is so even though the trespasser has come on A.'s land with a felonious intention, provided he has not yet carried it into effect. But if the trespasser was in the act of breaking into A.'s house or of attacking any of the inmates, A.'s act would be held justifiable at law.[4]

It is a crime at common law knowingly to send to market for human consumption meat which is unfit for that purpose, and by statute whether the sender knows it to be so or not.[5] If death results from such an act, there will be ground for an indictment for manslaughter.[6]

If death be caused unintentionally by an unlawful act which is merely a tort and not a crime, the prisoner cannot be convicted of manslaughter, unless he was guilty of gross negligence. It is no longer law that any one who causes death by doing an unlawful act commits manslaughter, even though he was guilty of no negligence. The summing-up of Tindal, C. J., in *R.* v. *Fenton*[1] is contrary to the ruling of Field, J., in the more recent case of *R.* v. *Franklin.*[2]

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[1] *R.* v. *McNaughten* (1881), 14 Cox, 576.

[2] *R.* v. *Billingham* (1825), 2 C. & P. 234; *R.* v. *Perkins* (1831), 4 C. & P. 537; *R.* v. *Coney and others* (1882), 8 Q. B. D. 534.

[3] *R.* v. *Bradshaw* (1878), 14 Cox, 83. An unlawful act in a lawful game renders the game unlawful.

[4] See *post*, pp. 299, 300.

[5] See 35 & 36 Vict. c. 74, s. 2, and *Fitzpatrick* v. *Kelly* (1873), L. R. 8 Q. B. 337.

[6] *R.* v. *Stevenson* (1862), 3 F. & F. 106; *R.* v. *Jarvis, Ib.* 108; *R.* v. *Crawley, Ib.* 109; *R.* v. *Kempson* (1893), 28 L. J. (Newspaper) 477.

A., from wanton mischief, threw stones down a coal-pit and knocked away a scaffolding. The absence of the scaffolding caused an accident by which B. was killed. A. was rightfully convicted of manslaughter. It is true that in the state of the law existing at the date of this case A.'s act was merely a civil trespass and not a crime; but as the mine was still being worked, and this fact must have been known to A., there was clearly gross negligence on A.'s part.[3]

In *R.* v. *Franklin,*[2] the prisoner took up a large box from a refreshment stall on the West Pier at Brighton, and in sheer wantonness threw it into the sea. The box struck a man who was swimming in the sea close to the pier, and caused his death. The counsel for the prosecution, relying upon the case just cited, suggested that as the prisoner had done an unlawful act it was unnecessary for him to prove negligence. But Field, J., said that the case must go to the jury on the broad ground of negligence, and that the fact that the prisoner had committed a civil wrong against the owner of the box was immaterial to the charge of manslaughter; and Mathew, J., concurred in this view of the law. There was evidence of gross negligence in this case as well as in *R.* v. *Fenton*; and the prisoner was convicted and sentenced to two months' imprisonment.

Certain learned writers (such as Hale, East and Foster) would further limit the above statement of the law by restricting it to crimes which are *mala in se.* In their opinion, if the prisoner causes death by doing an act which is only criminal because a statute has forbidden it—in other words, is only *malum quia prohibitum*—he cannot be convicted of manslaughter without proof of culpable negligence. But it is difficult to find any good ground for this distinction. Every one is bound to obey the statute law, just as much as the common law; and ignorance of either is no excuse. Hence the only safe proposition appears to be that a prisoner, who had no intention to kill and who was not guilty of gross negligence, can only be convicted of manslaughter if he caused death by means of some criminal act or omission.

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[1] (1830), 1 Lewin, 179.

[2] (1883), 15 Cox, 163.

[3] *R.* v. *Fenton, suprà*; and see *R.* v. *Sullivan* (1836), 7 C. & P. 641.

When, however, an act is not wholly prohibited but only when done in certain circumstances, it is submitted that, in order to convict the prisoner of manslaughter, the prosecution must, in the absence of gross negligence, prove that the death in the particular case was the result of the act being done with those circumstances, and that the act itself without the circumstances which render it illegal would not have caused the death. Thus, if an act innocent in itself is prohibited merely when done in a particular manner or at a particular time or place, it must be shown that the death was caused by the act being done in that manner and at that time or place; for if the death be due to the performance of a lawful act without any negligence on the part of the prisoner, no crime is committed.

A. was driving his motor car with due care and caution, when a little child suddenly ran across the road in front of it and was killed. The car was going at that moment at a speed slightly in excess of the rate prescribed by law; but the injury to the child would have happened in precisely the same way if the car had been going at a speed below the legal limit. It is submitted that A. cannot be held guilty of manslaughter, as the accident was not caused by the illegal excess of speed.[1]

So far we have dealt with cases in which the prisoner's conduct is criminal, because he has done that which it was his duty not to do. But his conduct may also be criminal where he omits to do that which it is his duty to do. If death be the direct result of any such criminal omission, the prisoner is guilty of manslaughter; if he deliberately abstained from doing his duty with the object and intention that death should follow, he is guilty of murder.

Whenever a person has the custody and charge of another and is able to supply that other with proper food and lodging, but neglects to do so, he is responsible if death results from such omission.[2]

If A. illegally arrests B. and keeps him a close prisoner without sufficient food and drink or in unwholesome air, and B. dies, A. is guilty of murder, although his intention was not to starve him to death, but to keep him alive and to starve him into doing something in compliance with A.'s own purposes; for by imprisoning him he has deprived him of all chance of obtaining food from others.[1]

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[1] It is stated that in a case *R.* v. *Cornalbas*, where the prisoner was indicted for manslaughter by driving in a motor car over a boy, Bray, J., expressed the opinion that, negligence or no negligence, if the speed was over twenty miles an hour it would be manslaughter; but the case was not decided on this point (see *The Times*, June 27th, 1905, p. 10).

[2] See the Children Act, 1908, discussed, *post*, pp. 293, 310, 311.

On the other hand, if a maidservant who has free control of her actions and is able to take care of herself, remains in a service where she is starved and badly lodged, the mistress will not be criminally responsible for the consequences; they are the result of the servant's own conduct in remaining there.[2]

But the duty that the prisoner neglects must be a duty which he legally owed to the deceased, or else no prosecution for manslaughter can follow. Thus, non-interference to prevent a stranger from committing suicide is not indictable. "If I see a man, who is not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him. I am under no legal obligation to a stranger."[3] "To render a person who has the charge of another criminally responsible for neglect, there must be on the part of such person a duty arising from the helpless character of the person who is under control. Such a duty, for instance, arises in the case of those who have charge of infants, invalids or lunatics."[4]

If a signalman sleeps at his post, and as a result of the points not having been changed a fatal collision occurs, he will be held criminally responsible; for he owes a duty to the public as well as to his employers, and this duty he has neglected.

A young unmarried woman being about to be confined returned to the house of her stepfather and mother, and was confined in the absence of her stepfather. Her mother took no steps to procure the assistance of a midwife, and in consequence the daughter died in her confinement. There was no evidence that the mother had the means to pay for the services of a midwife. It was held that there was no legal duty upon the mother to call in a midwife, and that she could not therefore be convicted of manslaughter.[5]

The prisoner, a woman of full age and without any means of her own, lived alone with, and was maintained by, the deceased, her aunt, a woman of seventy-three. For the last ten days of her life the deceased suffered from a disease which prevented her from moving or doing anything to procure assistance. The prisoner did not secure for her the services of any nurse or medical man, and apparently gave her none of the food which was sent to the house by tradesmen, thus greatly accelerating her death. It was held that under these circumstances there was a legal duty upon the prisoner to supply her aunt with sufficient food to maintain life, and that having neglected that duty the prisoner was rightly convicted of manslaughter.[1]

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[1] *R.* v. *Huggins* (1729), 17 St. Tr. 309, 376.
[2] *Per* Erle, C. J., in *R.* v. *Smith* (1865), L. & C. at p. 625.
[3] *Per* Hawkins, J., in *R.* v. *Paine, The Times,* February 25th, 1880.
[4] *Per* Blackburn, J., in *R.* v. *Smith* (1865), L. & C. at p. 629.
[5] *R.* v. *Shepherd* (1862), 31 L. J. M. C. 102.

A great number of omissions have been made criminal by modern legislation. Thus by section 12 (1) of the Children Act, 1908,[2] "if any person over the age of sixteen years, who has the custody, charge or care of any child or young person, wilfully . . . neglects, abandons or exposes such child or young person, or causes or procures such child or young person to be . . . neglected, abandoned or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health, . . . that person shall be guilty of a misdemeanour," and, should death ensue, of the felony of manslaughter. A subsequent clause in the same section provides that "for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health, if he fails to provide adequate food, clothing, medical aid or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor."

If, therefore, any parent who is able to provide medical aid for his sick child omits to do so and the child dies in consequence, the parent is guilty of manslaughter. So is any parent who, being unable to provide medical aid for his sick child out of his own resources, omits to notify the proper authorities.

The duty of a parent to provide medical aid for his children whenever they are seriously ill has been much discussed in connection with prosecutions taken against the Peculiar People. They are a religious sect who disbelieve in the medical treatment of illness, basing their doctrine upon the verse, "Is any sick among you? Let him call for the elders of the church, and let them pray over him, anointing him with oil in the name of the Lord."[3] This advice, given hundreds of years ago to people in a different climate and with different manners and customs at a time when medical science was in its infancy, they still follow literally: and they conscientiously believe that they have done their duty, even though their children die in some youthful illness—a result from which the attendance of a doctor would undoubtedly have saved them.

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[1] *R.* v. *Instan,* [1893] 1 Q. B. 450.

[2] 8 Edw. VII. c. 67. And see *post*, p. 310.

[3] Epistle of St. James, Chap. V., vv. 14, 15.

But the offence is hard to prove; for the prosecution must first satisfy the jury that it was necessary to call in medical aid, and then that the child died in consequence of their failure to do so, or that its death was accelerated by their omission. Thus, where a child of two years of age who suffered from chronic inflammation of the lungs and pleura wasted away and died after an illness of eight or nine months, and the father never summoned medical assistance, but called in the elders of his church to pray over the child and anoint it with oil, it was held that the father was guilty of manslaughter.[1] In a similar case,[2] however, the medical witness for the prosecution stated that in his opinion the chances of life would have been increased by having medical advice, and that life might possibly have been prolonged thereby: but he could not say that it would probably have been prolonged. The prisoner was convicted and released on his own recognizances; but the Court for Crown Cases Reserved quashed the conviction. Coleridge, L. C. J., remarked: "It is not enough to show neglect of reasonable means for preserving or prolonging the child's life; but to convict of manslaughter it must be shown that the neglect had the effect of shortening life." Stephen, J., said: "Under section 37 of 31 & 32 Vict. c. 122,[3] it may be that the prisoner could have been convicted of neglect of duty as a parent, but to convict of manslaughter you must show that he caused death or accelerated it."

(b) *Criminal negligence, causing Death.*

Whenever death is caused by gross negligence in the performance of some act which is not in itself criminal—it may be a tort, it may be an immoral act or one contrary to public policy, it may even be in itself a perfectly lawful act—still, if the prisoner was guilty of criminal negligence in the matter, and the direct result is the death of a human being, he will be convicted of manslaughter.

In the first place, the prosecution must prove that the death was the direct result of the prisoner's act or omission. For this purpose it must show "facts which constitute a chain of circumstances leading naturally" from the prisoner's alleged misconduct to the death.[1] It will then, in strict law, be for the prisoner to prove that he was not negligent, or at all events was not criminally negligent, in acting as he did. But in practice the prosecution generally takes upon itself the burden of proving affirmatively that the prisoner was guilty of criminal negligence.

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[1] *R.* v. *Downes* (1875), 1 Q. B. D. 25; and see *R.* v. *Senior*, [1899] 1 Q. B. 283.

[2] *R.* v. *Morby* (1882), 8 Q. B. D. 571.

[3] Poor Law Amendment Act, 1868, which contained a provision (now repealed) resembling, but not so wide as, that in the Children Act, 1908. Similar provisions were also contained in the repealed Acts for the Prevention of Cruelty to Children (52 & 53 Vict. c. 44; 57 & 58 Vict. c. 41; 4 Edw. VII. c. 15).

Of course, if the death was caused by a pure accident, no crime is committed. But if the act done or the omission made was one which any one of ordinary prudence ought, under the circumstances, to have known to be dangerous to human life or likely to cause grievous bodily injury, then to do that act or make that omission is culpable negligence and not a pure accident. Where what has happened was in the circumstances so probable a result of what the prisoner did that a person of ordinary prudence would have taken precautions to prevent it, and the prisoner omits to take such precautions with fatal results, he is clearly guilty of negligence. Such negligence may consist either in the doing of an act rashly without knowing its nature or probable consequences, or in the careless and incautious manner of doing it.

But to convict the prisoner it is not sufficient to show that he was guilty of some negligence in the matter.[2] An amount of negligence, which would entitle an injured plaintiff to damages in a civil action, will often be insufficient. To render the defendant criminally liable, the jury must be satisfied that the prisoner's state of mind was criminal. Whenever the natural or probable consequence of the prisoner's conduct is to cause death or grievous bodily harm to another, and the prisoner is culpably heedless of this obvious fact or culpably reckless as to whether such consequences follow or not, his state of mind is criminal; and, if death ensue, he will be convicted of manslaughter. But without some such evidence of *mens rea*, mere negligence will not expose him to penal consequences, though it may render him liable to a civil action.

It is difficult to define with any greater precision the degree of negligence which will be deemed criminal. But, to be criminal, it must be so gross and culpable as to deserve the epithet "wicked;" it must be the outcome of a criminal state of mind. There must be some evidence of *mens rea* in addition to the proof of negligence. Such negligence must be the personal negligence of the accused, not merely that of his servants.[1] There must be a personal duty on the accused, he must personally neglect that duty and such neglect must directly cause the death; or no indictment will lie. "It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge; but as a general rule there must be something of that kind which is designated by the expression *mens rea*. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master."[2]

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[1] *Per* Huddleston, B., in *Isitt* v. *Railway Passengers' Assurance Co.* (1889), 22 Q. B. D. at pp. 510, 511.

[2] See *R.* v. *Izod* (1904), 20 Cox, 690.

If a person takes upon himself to administer drugs being ignorant of their probable effects and thus causes the death of another, he will be guilty of criminal negligence.

So, too, a medical man must, at his peril, use proper skill and caution in administering a poisonous drug or in performing an operation dangerous to human life.[3]

If a man accidentally kills another while shooting at a mark or target in a place adapted for that pastime and under circumstances which render such shooting permissible, he commits no crime. But where A., B. and C. for the purpose of practising shooting went into a field close to roads and houses, taking with them a rifle which would be deadly at a mile, and B. placed in a tree as a target a board which was handed to him by A. in the presence of C., and all three fired shots at this board from a distance of about 100 yards, taking no precautions of any kind to prevent danger to the public from such firing, and one of the shots thus fired by one of them, though it was not proved by which, killed a boy in a tree in a garden near the field at a spot distant 393 yards from the firing point, the jury found A., B. and C. guilty of manslaughter, and it was held by the Court for Crown Cases Reserved that all three had been guilty of a breach of duty in firing at the spot in question without taking proper precautions to prevent injury to others, and were rightly so convicted.[4]

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[1] *R.* v. *Bennett* (1858), Bell, C. C. 1; *R.* v. *Huggins* (1730), 17 St. Tr. 298, 310. And see *ante*, pp. 129, 130.

[2] *Per* Cave, J., in *Chisholm* v. *Doulton* (1889), 22 Q. B. D. at p. 741.

[3] *R.* v. *Spencer* (1867), 10 Cox, 525; *R.* v. *Macleod* (1874), 12 Cox, 534.

[4] *R.* v. *Salmon and others* (1880), 6 Q. B. D. 79.

CHAPTER IV.

JUSTIFIABLE AND EXCUSABLE HOMICIDE.

MURDER consists, as we have seen, in feloniously causing the death of another with malice aforethought—manslaughter, in feloniously causing the death of another without malice aforethought. But a homicide is "justifiable" when death is lawfully inflicted, and "excusable" when the death is the result of an accident. In the two latter cases the homicide is no crime.

The distinction between justifiable and excusable homicide was formerly of considerable importance. If the homicide was justifiable the accused was found not guilty, whereas if the homicide was excusable the accused was found guilty and his chattels were forfeited to the Crown; though ultimately it became usual for the Crown to restore the chattels[1] and grant the accused a free pardon. In 1828 the general forfeiture of goods for excusable homicide was abolished.[2] Now in cases both of justifiable and excusable homicide the accused is found not guilty.

JUSTIFIABLE HOMICIDE.

Justifiable homicide may be defined as the killing of a human being, either in the discharge of a legal duty or in the exercise of a legal right. In both cases the act which causes death is intentional and lawful. The circumstances which create such a duty or confer such a right may be grouped under five heads:—

(1) Where a duly authorised officer of justice executes a criminal, condemned to death by a competent Court. If any person other than the duly authorised executioner carries out the sentence, he is guilty of murder. Again, the mode of execution must be strictly in accordance with the sentence; hence if the officer of justice beheads a criminal who is sen-

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[1] Except the "deodand," *i.e.*, the instrument with which the death was caused. For further information as to deodand, see Pollock and Maitland, History of English Law, Vol. II. p. 473.

[2] 9 Geo. IV. c. 31, s. 10, re-enacted by 24 & 25 Vict. c. 100, s. 7.

tenced to be hanged or *vice versâ*, he is guilty of murder. A technical defect in the proceedings is immaterial, if the Court had jurisdiction over both the subject-matter and the person condemned.

(2) An officer of justice is, in many cases, entitled to use force in order to arrest a criminal, or to prevent his escaping from custody. If it is necessary to use deadly weapons in order to effect the arrest or to prevent the escape of the criminal and death results, the homicide is justifiable. Policy, or rather necessity, obviously requires that every minister of justice should be protected, not only in executing any express sentence of the law, but also in doing every act which the law requires him to do in discharging the duties of his office. On the same principle protection is extended to all private persons who are called upon to assist officers of justice in executing their duties. So a gaoler may kill any convicted prisoner who is endeavouring to escape from custody. In some cases also the law confers upon private citizens the right, and imposes upon them the duty, of taking prompt action for the advancement of justice and the prevention of crime, although no officer of justice be at hand. And generally whenever A. has lawful authority to arrest or imprison B. and uses only proper means for that purpose, then if B. resists and is killed in the struggle, the homicide is justifiable; although if A. be killed by B., B. is guilty of murder.

(3) The legal position of persons, whether military or civilian, who cause death in dispersing a riot, has been discussed in a previous chapter.[1] Where the mob is guilty merely of a common law riot, which is a misdemeanour, only slight force may be used for this purpose and not deadly weapons. As soon, however, as any of the rioters begin to commit any felonious violence, such as arson, housebreaking or murder, deadly weapons may be used by either soldiers or civilians, provided they can afterwards satisfy a jury that such extreme measures were reasonably necessary in the circumstances to disperse the mob and to prevent any further felonious violence. Where, however, the riot has become felonious under the

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[1] *Ante*, pp. 167, 168.

provisions of the Riot Act, 1715,[1] any person engaged in lawfully dispersing the mob is indemnified against all proceedings, civil or criminal, by the express words of section 3 of that Act.

If in the course of dispersing a riot an innocent by-stander should be accidentally killed, two questions arise :—

1. Whether under the circumstances it was necessary in order to disperse the riot to have recourse to deadly weapons.
2. Whether there was any negligence in the use of deadly weapons which caused the death of the person who was not rioting.

Thus, where a man named Lewis, who was assisting in the suppression of a riot, shot at a rioter and accidentally killed a boy who was merely looking on, Tindal, C. J., remarked : "If the firing of the pistol by Lewis was a rash act, uncalled for by the occasion, or if it was discharged negligently and carelessly, the offence would amount to manslaughter, but if it was discharged in the fair and honest execution of his duty, in endeavouring to disperse the mob, by reason of their resisting, the act of firing the pistol was then an act justified by the occasion, under the Riot Act before referred to, and the killing of the boy would then amount to accidental death only, and not to the offence of manslaughter." [2]

(4) Where a person kills another in order to prevent his committing some forcible and atrocious felony, such as murder, rape, robbery, burglary or arson, the homicide is justifiable if there was no other obvious means of preventing the crime.[3] If there were any such means, resort should first be had to them. If the crime be a felony against the person, the party attacked may repel force by force, and will be excused from the consequences. Thus a woman in defence of her chastity may lawfully kill a man who is attempting to ravish her. So, too, the owner of a dwelling-house, or any member of his family, or even a lodger, may, in order to prevent arson or burglary, lawfully kill the assailant. And not only the party whose person or property is attacked or his servants, but also in most cases any stranger who is present at the time, will be equally justified in killing the aggressor.[4]

Where a son, believing that his father was cutting the throat of his mother, shot and killed him, it was held that, if he had reasonable grounds for believing, and honestly believed, that his act was necessary to save his mother's life, the homicide was justifiable.[1]

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[1] 1 Geo. I. st. 2, c. 5.

[2] In his charge to the grand jury at Bristol, January, 1832, quoted in 5 C. & P. at p. 267, n.

[3] *R.* v. *Symondson* (1896), 60 J. P. 645.

[4] 1 Hale, 481, 484 ; Fost. 274.

"Burglars rob A.'s house; they are escaping over his garden wall, carrying off A.'s jewels with them. A. is in no peril of his life, but he pursues the gang, calls upon them to surrender, and having no other means of preventing their escape, knocks down one of them, who dies of the blow. A., it would seem, if we may accept the authority of Foster,[2] not only is innocent of guilt, but has also discharged a public duty."[3] But if a burglar has abandoned his attack upon A.'s dwelling-house, and is running away with no goods of A.'s in his possession, it is submitted that A. has no right to kill him.

The law, however, grants no protection to the owner of property, if he shoots at and kills a mere trespasser, even though such trespasser has come on his land with a felonious intention, provided he has not yet commenced to carry it into effect. If A., finding a trespasser upon his land, beats and thus chances to kill him, he is guilty of manslaughter; or, if there be circumstances evidencing malice, he may be convicted of murder.[4]

(5) We have already spoken of the right of self-defence.[5] Whenever it is necessary for a person in defence of himself, wife, child or any one under his protection to kill the assailant, no crime is committed. But the means adopted to repel an attack must in every case be reasonable and commensurate with the force employed by the assailant. In such cases, and in other instances which might easily be cited, the person who has caused the death of another had a right to use force, or it was his duty to use force; and therefore if he used no more force than was reasonably necessary under the circumstances to exercise his right or to perform his duty, even homicide is justifiable. But the force used must not be excessive nor continued longer than was necessary, and the cause which justifies the use of force must still exist at the time when the fatal blow was struck. Thus if a fugitive criminal after a fierce struggle is at last captured by the police, and all resistance on his part is over, it would be murder for one of the policemen to kill him in revenge for injuries received from him in the struggle.

In dealing with self-defence the old books make a distinction between those cases in which the person attacked was himself originally to blame and those in which he was wholly innocent and passive from the very commencement of the affray. In the former case it was held that the homicide was excusable only and not justifiable. If an attack be made upon a person, who has done nothing to provoke it, of so murderous a character that he reasonably believes his life to be in danger, he is justified in killing his assailant if such a course be the only obvious means of saving his own life. But when there has been a quarrel in which both A. and B. have taken part and blows have been interchanged in anger, each party in turn assaulting the other—so that both are in some degree to blame—then if A. kills B., even in self-defence, he is *primâ facie* guilty of manslaughter, and the crime can only be reduced to non-felonius homicide if A. can show that, before the mortal blow was given, he had declined any further combat and retreated as far as he could with safety, and also that he killed B. through mere necessity, and to avoid immediate death. The ancient authorities place this case under the head of excusable homicide, because it so nearly approaches manslaughter; but as the fatal blow is here delivered with the express intention of killing or at least of disabling B., it appears logically to fall under the head of justifiable homicide. The distinction, however, is no longer of any importance.

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[1] *R.* v. *Rose* (1884), 15 Cox, 540.

[2] Foster's Crown Cases, pp. 271—274.

[3] Dicey's Law of the Constitution, 8th ed., 494.

[4] See *Wild's Case* (1837), 2 Lewin, 214.

[5] *Ante*, p. 7.

But where A. of malice aforethought discharges a pistol at B. and then runs away, and B. pursues him, and A. thereupon turns back, and in his own defence kills B., this has been held to be murder; for the whole transaction is tainted by the original malice.[1]

Excusable Homicide.

Excusable homicide is committed when one man, in doing a lawful act in a lawful manner with due care and without intending to kill or injure any one, causes the death of another. It differs from manslaughter in this respect—that in manslaughter the death is always the result of some unlawful conduct—either the act which causes death is criminal in itself or there was criminal negligence on the part of the accused; whereas in excusable homicide the accused has done nothing unlawful, nor has he been guilty of gross negligence. A pure accident is no crime. Again, the distinction between justifiable and excusable homicide lies in the intention of the slayer. In justifiable homicide the slayer was entitled to kill and he intended to do the act which caused the death; in excusable homicide there was no such intention; the slayer did not intend to kill the deceased, or even to do him grievous bodily harm; and the death is caused solely by mischance.

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[1] See *R.* v. *Mawgridge* (1707), Sir John Kelyng's C. C., at p. 129.

Such mischance may occur in many different ways.

(a) If the death be the result of a pure accident, no crime is committed. But if the act or omission which caused the death be one which any person of ordinary prudence ought under the circumstances to have known would be dangerous to human life or likely to cause grievous bodily injury, then to do that act or make that omission is culpable negligence and not a pure accident. Or, in the words of Sir Fitzjames Stephen: "An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it."[1]

Thus no crime is committed if, when a blacksmith is working with his hammer, the head suddenly flies off through no fault of his and hits and kills a by-stander. So if A. when walking down Fleet Street slipped on a piece of orange-peel and lurched against B., who in consequence fell and struck his head on the kerb with fatal results, the homicide is excusable.

(b) Homicide also is excusable if it be committed under an honest and reasonable mistake of fact, provided the mistake be of such a kind that, had the facts been as the prisoner mistakenly believed, his act would have been lawful.

Thus, no crime is committed in either of the following cases:—

A. is alarmed in the night and sees a man in his house, whom he honestly believes to be a burglar and therefore shoots. The man really was a member of his own family.

B. administers to one of his children a drug which he has received from a chemist and which he has no reason to suppose to be other than a salutary medicine; his ignorance of its true nature will excuse him, should it prove to be a deadly poison.

But if a man fires at A. under such circumstances that killing him would be manslaughter, but by accident hits and kills B., he is guilty of manslaughter.[2]

(c) A parent or schoolmaster has the right to inflict reasonable chastisement on his child or scholar, provided the latter be old enough to appreciate correction, and no greater harm is inflicted than is called for by the occasion.[1] Not only must the chastisement be moderate, but it must be administered with a reasonable instrument. To inflict excessive correction is unlawful. Thus a schoolmaster was convicted of manslaughter who beat a scholar for two hours with a stick so that he died.[2]

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[1] Digest of the Criminal Law, 6th ed., Art. 231.

[2] *R.* v. *Gross* (1913), 77 J. P. 352; 23 Cox, 455.

(d) Again, where death results from a lawful surgical operation undertaken with the consent of the patient and performed with due care on the part of the surgeon, it is excusable. In the case of a young child, the consent of the parent or guardian must be obtained. An operation performed without proper consent would be unlawful, and the surgeon performing it would strictly be guilty of manslaughter if death resulted, however much skill and care be employed.

To this rule, however, there is one possible exception. If an injured man were brought into a hospital unconscious, or in such a condition that he was incapable of exercising a reasonable discretion in the matter, and the surgeon honestly believed on good grounds that an operation was necessary in order to save the man's life, it is submitted that the surgeon would commit no crime if in such a case he operated without the man's consent and death ensued.

(e) Homicide is also excusable if a man, whilst engaged in a lawful sport or playing a lawful game with due care and without any intention to hurt, unfortunately kills another. Football,[3] cricket, wrestling, boxing with gloves, and fencing with buttoned foils are lawful games. Again, a man commits no crime if he accidentally kills another while shooting at a mark or target in a place adapted for that pastime and under circumstances which render such shooting permissible.[4] A prize-fight is not a lawful game, nor is a boxing match, even with gloves, if conducted in a manner known to be dangerous to life or limb. And whenever a game degenerates into a brawl and blows are interchanged in anger, it ceases to be a lawful game.

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[1] *R.* v. *Griffin* (1869), 11 Cox, 402.
[2] *R.* v. *Hopley* (1860), 2 F. & F. 202.
[3] *R.* v. *Bradshaw* (1878), 14 Cox, 83.
[4] But see the case of *R.* v. *Salmon and others* (1880), 6 Q. B. D. 79, fully set out *ante*, p. 296.

The distinction between murder, manslaughter and excusable homicide may be further illustrated by the following examples :—

If a workman employed in the repair of a building throws stones or rubbish from the housetop, and thereby kills an individual passing underneath, this act will, in the eye of the law, amount to murder, manslaughter or excusable homicide according to the degree of precaution taken and the necessity for taking it. If the act were done in a public street without any kind of warning at a time when many persons would usually be passing, this might in strictness be held murder—if at a time when persons were not likely to be passing, it would be manslaughter, unless the workman can show that he gave a warning loud enough to be heard below ; if done in a retired spot where no persons had a right to pass or were in the habit of passing, it would be homicide by misadventure.

So, if a person, riding through a street slowly and using reasonable caution to prevent mischief, rides over and kills a child that is heedlessly crossing the road, the result is purely accidental ; but if he had used such speed as under the circumstances was not unlikely to occasion accident, the want of caution might render him amenable to a charge of manslaughter ; and were he to ride into the midst of a crowd at so furious a rate that loss of life was likely thence to ensue and did ensue, he might, by thus wilfully endangering human life, be technically guilty of murder.[1]

If a medical practitioner causes the death of another intentionally, that of course will be murder. But if, in the course of his professional duties and without any intention to kill, he causes death by gross negligence, unskilfulness or ignorance, he may be guilty of manslaughter. If, therefore, an operation, which results in the death of the patient, be performed by one whether duly qualified or not to act as a surgeon, the questions for the jury will be, first, whether the deceased died from the effects of the operation performed on him by the accused ; secondly, whether the treatment pursued by the prisoner towards the deceased was marked by negligence, unskilfulness or ignorance. If the jury answer either of these questions in the negative, no crime is committed.[2]

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[1] See *R.* v. *Dant* (1865), L. & C. 567.

[2] *R.* v. *Van Butchell* (1829), 3 C. & P. 629 ; *R.* v. *Williamson* (1807), *Ib.* 638 ; *R.* v. *Webb* (1834), 1 Moo. & Rob. 405.

CHAPTER V.

ACTS ENDANGERING HUMAN LIFE.

THE common law made very scanty provision for the repression of acts which merely endangered human life. If no fatal consequences followed and the act in question did not amount to either robbery or rape, the only remedy was an indictment for battery or assault—misdemeanours, which as a rule were very lightly punished. But many statutes have now been passed to remedy this omission.

1. *Attempt to Murder.*

Every attempt to commit a crime is a misdemeanour at common law; but an attempt to murder has been made felony by statute, whether any bodily injury be effected or not.[1] It is punishable with penal servitude for life and cannot, therefore, be tried at Quarter Sessions.

The statute gives as examples several kinds of acts which, if done with intent to murder, amount to an attempt to murder, such as administering poison, wounding or causing grievous bodily harm, blowing up buildings, setting ships on fire, or casting them adrift. Further, by section 14 it is a felony punishable with penal servitude for life to unlawfully and maliciously attempt to administer or attempt to cause to be administered to any person any poison or other noxious thing with intent to commit murder. Shooting at a person or attempting to shoot "by drawing a trigger or in any other manner," or attempting to drown, suffocate or strangle any person with intent to commit murder, is punished with equal severity.

In the case of wounding with intent to murder, the prosecution must satisfy the jury that the prisoner's weapon had cut through both skins of the prosecutor's body; else the injury does not in law amount to a wound. If the intent to murder be not proved, the prisoner may be convicted of unlawfully and maliciously wounding.[1]

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[1] 24 & 25 Vict. c. 100, ss. 11—15.

It is sometimes difficult to say how many of the series of acts, which constitute the full offence of murder, must be gone through in order that the would-be murderer should be guilty of an attempt. If A. resolves to murder B., buys a revolver, loads it and lies in wait for him, he has so far committed no crime; he has merely given evidence of a murderous intention. So if when B. approaches A. raises his revolver and prepares to take aim at him, this, it is submitted, would not amount to an attempt. But if he places his finger on the trigger and deliberately takes aim at B. and is then seized from behind, he has probably committed an attempt, although he never fired; he will undoubtedly have done so, if he pulls the trigger and the bullet passes over B.'s head.

Again, by section 18 of the same Act it is provided that "whoever shall unlawfully and maliciously . . . by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person with intent to maim, disfigure or disable any person or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony," and liable to penal servitude for life.

Thus where a man, after having previously threatened to take his mother's life, came in one evening, immediately produced a six-chambered revolver with two chambers loaded, pointed it at his mother, saying, "I will give you this," and was seen to fumble about for the trigger, but was then seized by the wrists by another man, who eventually wrested the revolver from him, it was held that he was guilty of an attempt to discharge the revolver.[2]

Again, where during an interview the prosecutor saw the prisoner drawing from his pocket what he rightly guessed to be a loaded revolver, and promptly closed with him, with the result that the prisoner never quite got his arm sufficiently free to raise it and aim at the prosecutor before assistance arrived and the revolver was taken from him—the Court for Crown Cases Reserved held that the prisoner, who during the struggle had said several times to the prosecutor, "You've got to die," was rightly convicted under section 18, but not under section 14 of an attempt to murder.[3]

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[1] 14 & 15 Vict. c. 19, s. 5; see *post*, p. 321.

[2] *R.* v. *Duckworth*, [1892] 2 Q. B. 83.

[3] *R.* v. *Linneker*, [1906] 2 K. B. 99.

2. *Conspiracy or Inciting to Murder.*

Every conspiracy to commit a crime is a misdemeanour at common law punishable with two years' imprisonment;[1] but a conspiracy to murder is a misdemeanour punishable with penal servitude for ten years.[2] And by the same section "whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder" any one, is liable to the same punishment. In both cases it is immaterial whether the proposed victim be a subject of His Majesty or not, or be within the King's dominions or not.

3. *Concealment of Birth.*

"If any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at or after its birth, endeavour to conceal the birth thereof, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour."[3]

On an indictment for the murder of a recently-delivered child, the jury may convict the prisoner of concealment of birth. The offence is not triable at Quarter Sessions.

The prosecution must prove—

(i.) that a woman was delivered of a child;

(ii.) that when such child was dead the prisoner made a secret disposition of its body; and

(iii.) that by so doing the prisoner endeavoured to conceal its birth.

(i.) It is, as a rule, the mother of the dead child who commits an offence of this nature. But the statute applies to "every person who endeavours to conceal the birth," whether that person be the mother or not.[4]

It does not matter whether the "child died before, at or after its birth." But it must be dead before its body is secretly disposed of; otherwise no offence under this section will be committed.

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[1] As to the nature of a conspiracy, see *ante*, p. 255.

[2] 24 & 25 Vict. 100, s. 4. An incitement to murder an unborn child, as soon as it is born, is within the section: *R.* v. *Shephard*, [1919] 2 K. B. 125.

[3] *Ib.* s. 60.

[4] *R.* v. *Bate and others* (1871), 11 Cox, 686.

(ii.) "What is a secret disposition must depend upon the circumstances of each particular case. The most complete exposure of the body might be a concealment; as, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place, where the body would not be likely to be found. There would, in such a case, be a secret disposition of the body. The jury must say, in each case, whether or not the facts show that there has been such a disposition. . . . It is easy to suggest cases where placing a body in a particular situation would undoubtedly be evidence of a secret disposition, as if a body were thrown down from a cliff to the sea shore in a secluded place. If, however, the place were very much frequented, there might be no evidence of a secret disposition from such an act."[1]

A mere denial of the birth will not be sufficient;[2] nor will the fact that the woman, when about to be delivered, made no preparation or purposely arranged to be unattended in her confinement.[3] There must be some act of disposal of the body after the child is dead.

Thus, flinging it over a wall four and a half feet high into a grazing-field or shutting it up in a box or a drawer is a secret disposition;[4] but in one case, putting it in a box, closed but unfastened, in a room much resorted to by persons in the house,[5] and in another case leaving it on the bed covered over with a petticoat,[6] was held not to amount to a secret disposition of the dead body.

Some evidence of identity is required, though in practice very little. It is enough if the prosecution can prove in evidence that from her appearance the woman had been with child, that from her altered appearance or the state of her room she had been delivered, and that the dead body of a child was afterwards found in her room or in a box of hers or in some other place to which she would have had access.

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[1] *Per* Bovill, C. J., in *R.* v. *Brown* (1870), L. R. 1 C. C. R. at pp. 246, 247.

[2] *R.* v. *Turner* (1839), 8 C. & P. 755.

[3] *R.* v. *Izod* (1904), 20 Cox, 690.

[4] *R.* v. *Brown, suprà;* and see *R.* v. *Cook* (1870), 11 Cox, 542.

[5] *R.* v. *George* (1868), 11 Cox, 41; and see *R.* v. *Sleep* (1864), 9 Cox, 559.

[6] *R.* v. *Rosenberg* (1906), 70 J. P. 264.

Thus a woman apparently pregnant, while staying at an inn at Stafford, received by post on August 28th, 1870, a Rugby newspaper with the Rugby postmark upon it. On the same day her appearance and the state of her room indicated that she had been delivered of a child. She left for Shrewsbury next morning carrying a parcel. That afternoon the dead body of a newly-born child, wrapped in a *Rugby Gazette* of August 27th, 1870, bearing the Rugby postmark, was found in the ladies' waiting-room at Stafford railway station. There is a railway from Stafford to Shrewsbury; but, as there was no evidence that the woman had been to the Stafford railway station, it was held that there was no sufficient proof that the body found there was that of her child.[1]

(iii.) The endeavour to conceal the birth is the gist of the offence, and the secret act of disposal must be done with a view to such concealment. It is always open to the prisoner to urge that no concealment was intended and to prove that she had told her friends of her condition before her confinement. So, too, the fact that she had made preparations, *e.g.*, by summoning a doctor or making clothes for the child, would go far with the jury to show that no concealment had been intended.[2]

4. *Attempt to commit Suicide.*

It is a misdemeanour at common law for any one to attempt to kill himself; for suicide, if accomplished, is a felony. This offence is triable at Quarter Sessions, and is punishable with imprisonment for two years with hard labour.[3] It has been decided that attempted suicide is not an attempt to murder within 24 & 25 Vict. c. 100, s. 15.[4]

5. *Ill-treatment or Neglect of persons unable to take care of themselves.*

If, as we have seen, death results from or is accelerated by ill-treatment or neglect, those who had charge of the deceased may be indicted for manslaughter. But our law also deems such conduct criminal where death does not result. If a master, for instance, is bound to supply his apprentice or servant with food and does not do so, or if he inflicts any bodily harm on him, to his permanent injury or the danger of his life, he is guilty of a misdemeanour punishable with five years' penal servitude.[1] So, too, there are various statutes which make it a misdemeanour for any one who has charge of a lunatic to neglect or ill-treat him.[2]

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[1] *R.* v. *Williams* (1871), 11 Cox, 684.
[2] *R.* v. *Higley* (1830), 4 C. & P. 366.
[3] *R.* v. *Mann*, [1914] 2 K. B. 107.
[4] *R.* v. *Burgess* (1862), L. & C. 258; and see *ante*, p. 282.

But the persons least able to take care of themselves are, of course, children. The Children Act, 1908,[3] has consolidated the law on the subject and introduced several entirely new provisions. It applies to "children" up to the age of fourteen, and to "young persons" up to the age of sixteen.

The main section of that Act runs as follows:—

"If any person over the age of sixteen years, who has the custody, charge or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour. For the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor."[4]

On the trial of an indictment under this section the prosecution must prove four things:—

(i.) That the prisoner had the custody, charge or care of a child or young person.

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[1] 24 & 25 Vict. c. 100, s. 26.

[2] 23 & 24 Vict. c. 75, s. 13; 53 & 54 Vict. c. 5, s. 322; and see *Buchanan* v. *Hardy* (1887), 18 Q. B. D. 486.

[3] 8 Edw. VII. c. 67.

[4] S. 12 (1). See *ante*, pp. 293, 294, and also the indictment in the Appendix, No. 8, and *R.* v. *Tonks*, [1916] 1 K. B. 443.

(ii.) That the prisoner assaulted, ill-treated, neglected, abandoned or exposed such child or young person.

(iii.) That he did so wilfully.

(iv.) That he did so in a manner likely to cause such child or young person unnecessary suffering or injury to his health.

It is not necessary for the prosecution to prove that the child or young person has actually suffered or that injury has, in fact, been caused to his health. Still less is there any need for the prosecution to prove that the prisoner intended or desired any such result. It is sufficient if the child or young person was assaulted or neglected in a manner likely to cause unnecessary suffering or injury to his health. Lord Russell, L. C. J., in his judgment in the case of *R.* v. *Senior*,[1] thus defined the meaning of the phrase "wilfully neglects" which occurred in a preceding statute dealing with the same subject: "'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind."

This offence is punishable on indictment with fine not exceeding £100 and [or] imprisonment not exceeding two years with or without hard labour, or on summary conviction with fine not exceeding £25 and [or] imprisonment not exceeding six months with or without hard labour. Severer penalties are imposed by section 12 (5) of the Act where the offender is interested in money payable on the death of the child.

The new provisions of the Children Act, introduced to protect children from the dangers of suffocation, fire and intoxication, are as follows:—

"Where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air-passages of the infant) whilst the infant was in bed with some other person over sixteen years of age, and that that other person was at the time of going to bed under the influence of drink, that other person shall be deemed to have neglected the infant in a manner likely to cause injury to its health."[2]

"If any person over the age of sixteen years who has the custody, charge or care of any child under the age of seven years allows that child to be in any room containing an open fire grate not sufficiently protected to guard against the risk of the child being burnt or scalded, without taking reasonable precautions against that risk, and by reason thereof the child is killed or suffers serious injury, he shall on summary conviction be liable to a fine not exceeding ten pounds." [1]

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[1] [1899] 1 Q B. at pp. 290, 291; and see the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1.

[2] S. 13.

"If any person gives, or causes to be given, to any child under the age of five any intoxicating liquor, except upon the order of a duly qualified medical practitioner, or in case of sickness, or apprehended sickness, or other urgent cause, he shall, on summary conviction, be liable to a fine not exceeding three pounds." [2]

But the Children Act has not repealed the old section of the Offences against the Person Act, 1861, as to the abandonment or exposure of a child by any one who is under a legal obligation to take charge of it. "Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanour," and may be sent to penal servitude for five years.[3]

Thus, where a mother packed up her baby comfortably in a hamper and sent it by train to its father, it was held that she had committed an offence under this section, although the clerk at the station was told to be particularly careful with the hamper, and although the child did not suffer at all by travelling in such an unusual way.[4] It is, moreover, not necessary that the defendant should have had the actual custody of the child if he, being bound by law to provide for it, knowingly allowed it to be "abandoned or exposed." [5]

So, too, the Children's Dangerous Performances Acts, 1879 and 1897,[6] still remain in force, and forbid the employment of any boy under sixteen or any girl under eighteen in any dangerous public exhibition or performance, under a penalty not exceeding £10; and this fine is recoverable on summary conviction from the person who causes the child to take part in the performance, and also from the parent or guardian or any custodian of the child who aids or abets him. Moreover, if the child is injured in such performance, the employer is indictable for assault, and the Court at the trial may award compensation not exceeding £20 for the bodily harm which the child has sustained. The consent of the child or of its parents is no defence.

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[1] S. 15.
[2] S. 119.
[3] 24 & 25 Vict. c. 100, s. 27. See *R.* v. *White* (1871), L. R. 1 C. C. R. 311.
[4] *R.* v. *Falkingham* (1870), L. R. 1 C. C. R. 222.
[5] See *R.* v. *Connor,* [1908] 2 K. B. 26.
[6] 42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52.

A. hires B., a boy of fifteen, to wheel C., a girl of seventeen, in a barrow along a tight-rope at a great height from the ground. D., the father of B. and C., is a member of the same troupe, and had persuaded A. to engage his children. A. and D. can both be summarily convicted and fined under this section; if B. or C. sustain any injury in the performance, A. can be indicted for assault, and for manslaughter if the injury results in death.

Many other acts which endanger human life have been dealt with in previous chapters. Thus, sending a challenge to fight a duel is a misdemeanour,[1] and should the encounter end fatally, the fact that the deceased consented thus to risk his life will afford no defence to his opponent.[2] Any one who sends diseased meat to market to be sold for human food is guilty of a misdemeanour and, if death results, of manslaughter.[3] Any serious surgical operation involves risk to the patient's life; the utmost care is therefore required from the surgeon operating.[4]

Numerous other statutes besides those mentioned above deal with acts endangering human life. Thus, "where any person wilfully and maliciously breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life or cause serious bodily injury," he is liable to be fined twenty pounds or to be imprisoned for three months with or without hard labour.[5] Again, "any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life."[1] Many such acts are covered by the Malicious Damage Act, 1861,[2] such as destroying or rendering dangerous in the use any bridge, viaduct or aqueduct, placing obstructions on a railway line, masking or altering any light or signal with intent to endanger any ship, &c.[3]

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[1] See *ante*, pp. 183, 282.

[2] See *ante*, pp. 183, 282; *R.* v. *Barronet* (1853), 1 E. & B. 1.

[3] See *ante*, pp. 41, 289.

[4] See *ante* ,p. 303.

[5] The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 5.

The Factory Acts, which are now consolidated in the Act of 1901,[4] contain numerous provisions insisting on the fencing of dangerous machinery, the proper ventilation of workrooms, &c. Ample provision for the safety of miners is made by the Coal Mines Act, 1911.[5]

Similarly the sale of poisons is regulated by the Pharmacy Act, 1868,[6] and the Poisons and Pharmacy Act, 1908.[7]

So again, "if any person sends or attempts to send, or is party to sending or attempting to send, a British ship to sea in such an unseaworthy state, that the life of any person is likely to be thereby endangered," or "if the master of a British ship knowingly takes the same to sea in such an unseaworthy state, that the life of any person is likely to be thereby endangered, he shall be guilty of a misdemeanour, unless he proves that her going to sea in such an unseaworthy state was under the circumstances reasonable and justifiable."[8]

Again any one, who sends or attempts to send through the post a packet containing any explosive or dangerous substance, any sharp instrument not properly protected, any living creature or other thing which is likely to injure either other postal packets in course of conveyance or an officer of the Post Office, commits a misdemeanour.[9]

Lastly, the Pistols Act, 1903,[10] contains several useful provisions for preventing indiscriminate selling or hiring of pistols or other firearms, especially to persons under eighteen years of age, and to persons intoxicated or not of sound mind.[1]

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[1] The Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 2.

[2] 24 & 25 Vict. c. 97.

[3] *Ib.* ss. 33, 35, 36, 47. And see 24 & 25 Vict. c. 100, ss. 32 and 33.

[4] 1 Edw. VII. c. 22.

[5] 1 & 2 Geo. V. c. 50.

[6] 31 & 32 Vict. c. 121, ss. 1, 15—17.

[7] 8 Edw. VII. c. 55.

[8] The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 457. As to overloading ships, see s. 459.

[9] The Post Office Act, 1908 (8 Edw. VII. c. 48), s. 63.

[10] 3 Edw. VII. c. 18.

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[1] See ss. 4 and 5; and *Bryson* v. *Gamage, Ltd.*, [1907] 2 K. B. 630; *Matthews* v. *Gray*, [1909] 2 K. B. 89.

Chapter VI.

ASSAULTS.

Apart from such serious crimes as homicide, robbery and rape, the only offences against the person known to the common law were assault and battery, which, as a rule, were but lightly punished. Both these offences remain common law misdemeanours triable on indictment either at Assizes or Quarter Sessions, and punishable with imprisonment with or without hard labour for one year. The defendant may also be ordered to pay the costs of the prosecution.[1]

Any attempt unlawfully to use force against the person of another is an assault, provided the circumstances are such that the attempt if persisted in would be successful; any show or offer of violence under such circumstances is also an assault, even though the assailant does not in fact intend to persist in his attempt and do the actual violence which it is in his power to do. There is no assault unless it actually is in the assailant's power to inflict some bodily hurt. The fact that the person assaulted reasonably but erroneously believes that the defendant can and will do him bodily hurt is not sufficient.[2]

Thus it is an assault—

to strike either with or without a weapon at a man who is near enough to be struck, though the man avoids the blow;

to hold up one's fist in a threatening manner at a man who is within striking distance;

to fire a loaded gun at a man within its range, though the shot misses him;

to point a loaded gun at a man within its range, though it be not fired;

to set a dog at large at a man urging the dog to bite him;

to make any attempt to imprison or detain any person against his will.

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[1] 24 & 25 Vict. c. 100, s. 74.

[2] The opposite was held by Parke, B., in *R.* v. *St. George* (1840), 9 C. & P. 493; but this case is overruled by *R.* v. *James* (1844), 1 C. & K. 530.

But it is not an assault—

(1) to point at another a pistol which is unloaded or which is only loaded in such a manner that it cannot be discharged; for in neither case can any physical hurt be inflicted.[1] It is immaterial that the person aimed at is unaware of the circumstances which render the weapon harmless.

(2) to shake one's fist at a person who is so far off that he could not possibly be reached by a blow. But if A. be advancing with clenched fists with intent to strike B., and he approaches so near B. that he would almost immediately be within arm's length of him, and then A. is stopped, A. is guilty of an assault, although he was never quite near enough to B. to strike him.[2]

No mere words can ever be an assault.

A battery is the application of the least degree of force in an angry, rude or insolent manner to the person, or even to the dress,[3] of another. "The least touching of another in anger is a battery."[4] Thus every battery includes an assault; it is in short an assault which has succeeded. But no act which is done innocently or undesignedly in the ordinary intercourse of life is a battery.

Spitting in a man's face is a battery; spitting at him is only an assault.

Setting a dog at a man, which bites him, is a battery.

Kissing a girl against her will is a battery.

But patting a friend on the shoulder, or touching him to attract his attention, is no battery; nor is it battery for one person in a crowd to jostle another as they enter a public hall or a theatre; provided in each case that no more force is used than is unavoidable or reasonably necessary.

Defences to Assaults and Batteries.

Practically any circumstances which would render a homicide justifiable or excusable will be a defence to an indictment for assault or battery. For example, it will be a defence if the accused can prove that the act complained of falls under one of the following heads:—

(a) Misadventure.—If the act complained of be the result of a pure accident, no crime is committed. Thus it is no battery to strike or wound another by a pure accident,[5] nor is it if a horse runs away with his rider and knocks down a person crossing the road.[1] In every case the *onus* is on the prisoner to prove that his act was unintentional and not the result of any culpable negligence on his part.

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[1] *R.* v. *James* (1844), 1 C. & K. 530.
[2] *Stevens* v. *Myers* (1830), 4 C. & P. 349.
[3] *R.* v. *Day* (1845), 1 Cox, 207.
[4] *Per* Holt, C. J., in *Coles* v. *Turner* (1705), 6 Mod. at p. 149.
[5] *Weaver* v. *Ward* (1617), Hob. 134.

(b) Lawful sport.—It is also a defence to an assault or battery that the injury happened during the course of some lawful sport or game. For example, if during a boxing match with padded gloves, or a football or cricket match, a man be injured, he cannot prosecute or sue the person whose act caused the injury. It would be different if the game were an unlawful one, *e.g.*, a prize-fight, or if, though the game was a lawful one, the assailant intended to inflict unnecessary injury or was otherwise acting in flagrant disobedience to the laws of the game.

(c) Official duty.—Again, it is a defence to any criminal charge that it was the defendant's duty to do the act complained of. For example, it is often the duty of every officer of justice, and of all persons whom he summons to his assistance, to do acts in the administration of the law which, if done by other persons, would be indictable as batteries or assaults.[2] So a railway guard may use reasonable force to prevent any one entering a train in motion, and a sentry may stop any unauthorised person from entering a royal palace or a barracks.

(d) Reasonable correction.—A parent has a right to inflict reasonable chastisement on his child; so has a schoolmaster on his scholar.[3] But the child or scholar must be old enough to appreciate correction.[4] And the chastisement must be moderate and administered with a reasonable instrument.

In *Cleary* v. *Booth*[5] the question raised was whether the headmaster of a board school is justified in inflicting corporal punishment on a pupil who has misconducted himself outside the school, on his way to school, and out of school hours. The Court (Lawrence, J. and Collins, J.) held the schoolmaster had such authority, and remitted the case for the magistrates to find whether the punishment administered was excessive.

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[1] *Gibbons* v. *Pepper* (1696), 4 Mod. 405.

[2] See *post*, pp. 480, 481, and *Rose* v. *Kempthorne* (1910), 22 Cox, 356.

[3] This right is expressly recognised by the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), s. 28, and by the Children Act, 1908 (8 Edw. VII. c. 67), s. 37.

[4] *R.* v. *Griffin* (1869), 11 Cox, 402.

[5] [1893] 1 Q. B. 465.

(e) Self-defence.—It is also a defence if the assault complained of was committed by the accused in defence of himself, his wife, child or any one under his protection. This right has been already discussed.[1] But the acts adopted to repel an attack must in every case be reasonable and commensurate with the force employed by the assailant, and must not be continued after he has abandoned his attack. Some assaults may also be justified on the ground that they were committed in defence of a man's property; but this right is much more restricted than the right of self-defence. Thus, if a trespasser (A.) enters B.'s house and refuses to leave it, B. has a right to remove him by force, but not to strike him, even if he cannot otherwise turn him out of the house. If, however, while B. is seeking to eject A. from his premises, A. assaults B., then B. may use any degree of force necessary to defend himself and to remove A. from the house.[2]

(f) Lastly, consent is a defence to every common law assault, but not as a rule to a battery; for a battery is a breach of the peace. But non-resistance which is obtained by fraud is no consent.[3] There is an appreciable difference between consent and submission or non-resistance, induced by trickery or threats,[4] or resulting from weakness of intellect,[5] or from ignorance of the nature of the act proposed to be done. Though every consent involves a submission, it by no means follows that a mere submission involves consent. There can be no consent unless the person assailed is sane and sober and capable of exercising, and does exercise, a positive will in the matter.[6] "In many cases, as where an act is done to a person who is asleep or who has been drugged, there is no consent, though there is no active dissent."[7]

A prize-fight is a twofold battery, and the fact that each party consented to receive the blows of the other is no defence for either. All persons who make the preliminary arrangements for a prize-fight and all persons present at it who urge on and encourage the combatants are also guilty of a misdemeanour; but not a man who is accidentally present and merely stops to look on.[1]

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[1] *Ante*, pp. 300, 301.

[2] 1 Hale, 486.

[3] *R.* v. *Rosinski* (1824), 1 Moo. C. C. 19.

[4] *R.* v. *Flattery* (1877), 2 Q. B. D. 410.

[5] *R.* v. *Barratt* (1873), L. R. 2 C. C. R. 81; but see *R.* v. *Fletcher* (1866), L. R. 1 C. C. R. 39, and *R.* v. *Dee* (1884), 15 Cox, 579.

[6] *R.* v. *Lock* (1872), L. R. 2 C. C. R. 10.

[7] *Per* Quain, J., *ib.* at p. 14.

So far we have dealt with assault and battery as known to the common law. But the jurisdiction of our criminal Courts in such matters has been largely extended by several statutes, which have created a considerable variety of special kinds of assaults, some of which are punishable on indictment and others summarily by magistrates. The common law, as we have seen, drew a sharp distinction between an assault and a battery. But in these statutory provisions the distinction disappears and the word "assault" takes a wider meaning so as to include what was at common law termed a battery. We can only deal very briefly with these statutory assaults.

1. Wounding or causing grievous bodily harm, or shooting at any person, or by drawing a trigger or in any other manner attempting to discharge any kind of loaded arms at any person, with intent to maim, disfigure, disable or do some other grievous bodily harm, is a felony punishable with penal servitude for life.[2] To amount to "grievous bodily harm" the injury must be such as seriously to interfere with the health and comfort of the person injured, though it need not involve any risk to life. After proof of such injury the prosecution must also establish the special intent, which is set out in the indictment.[3] If it fails to do this, the prisoner cannot be convicted of felony; but where the indictment alleges wounding, and the jury negative the special intent, he can be convicted of the misdemeanour of unlawfully wounding.[4] The word "maim" has a special meaning; it denotes any bodily harm whereby a man is deprived of the use of any member of his body, which he can use in fighting, such as a leg, arm, hand or eye, or by the loss of which he is permanently weakened.[5] To "disfigure" is a wider term; many

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[1] *R.* v. *Murphy* (1833), 6 C. & P. 103; *R.* v. *Coney* (1882), 8 Q. B. D. 534.

[2] 24 & 25 Vict. c. 100, s. 18; *R.* v. *Duckworth*, [1892] 2 Q. B. 83; *R.* v. *Linneker*, [1906] 2 K. B. 99.

[3] All four intents can now be charged alternatively in the same count of the indictment: Indictments Act, 1915, rule 5 (1), and see indictment, No. 32, in the Appendix.

[4] See 14 & 15 Vict. c. 19, s. 5; *R.* v. *Miller* (1879), 14 Cox, 356.

[5] For a man to maim himself so as to render himself unfit for military service is a

an injury which is not a maim may yet be a disfigurement, *e.g.*, to cut off a man's nose. To "disable" means to cause permanent disablement.

2. An assault committed with intent to rob is a statutory felony punishable with penal servitude for five years.[1] On a charge of robbery the prisoner can be convicted of this offence. But a prisoner charged with this offence cannot be convicted of a common assault.

3. To unlawfully and maliciously wound, or to inflict, either with or without any weapon, any grievous bodily harm upon, any other person is a misdemeanour punishable with penal servitude for five years.[2] Any incision, which pierces both skins of the victim's body, is a "wound;" we have already defined "grievous bodily harm." On an indictment under this section it is not necessary for the prosecution to prove any special intent as it is in cases of felony under section 18 above. But the jury must find that the prisoner acted unlawfully and maliciously. The word "maliciously" has a very wide meaning. It is not necessary to prove that the prisoner had any spite or ill-will against the person injured or even that he intended to wound or inflict grievous bodily harm on that particular person. He will be deemed to have acted maliciously if he knew or ought to have known that the act which he intended to do would injure any one.

Where a soldier, in striking at a man with a belt, accidentally wounded a woman who was standing beside him, it was held that he was guilty of unlawfully and maliciously wounding her. The facts that he had no intention whatever of striking her, and had no reasonable cause to expect that she would be struck, were held to be immaterial.[3]

Where A. was out in a punt on a creek shooting wild fowl, and seeing B. in pursuit of wild fowl on the same creek, fired in the direction of B. with the intention merely of frightening him away, but owing to B.'s punt suddenly slewing round he was seriously wounded, it was held that A. was rightly convicted of unlawfully and maliciously wounding B., although he had no intention whatever of doing him any bodily harm.[4]

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misdemeanour. This and an attempt to commit suicide are the only cases in which a man can be convicted at common law of a misdemeanour committed upon himself: Co. Litt. 127 a; 1 Hawk. P. C., 7th ed., 626.

[1] Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 23 (3); and see Robbery, *post*, p. 331.

[2] 24 & 25 Vict. c. 100, s. 20. On an indictment under this section the prisoner can be convicted of an assault: *R.* v. *Taylor* (1869), L. R. 1 C. C. R. 194. See the indictment in the Appendix, No. 32.

[3] *R.* v. *Latimer* (1886), 17 Q. B. D. 859.

[4] *R.* v. *Ward* (1872), L. R. 1 C. C. R. 356.

Shortly before the conclusion of a performance at a theatre the prisoner, with the intention of causing terror in the minds of persons leaving the theatre, extinguished the gaslights on a staircase which a large number of persons would have to descend, and placed an iron bar across a doorway at the foot of the staircase so as to obstruct the exit. On finding the lights suddenly extinguished a large portion of the audience were seized with panic and rushed down the staircase, where the pressure of those behind forced those in front against the iron bar, with the result that many were injured. It was held by the Court for Crown Cases Reserved that the prisoner was rightly convicted of unlawfully and maliciously wounding.[1]

Where a wife, to escape from the violence of her husband, who had threatened to take her life, got out of a window and in so doing fell and broke her leg, it was held that the husband was properly convicted under section 20.[2]

4. An assault occasioning actual bodily harm is a misdemeanour punishable with penal servitude for five years.[3] Here it is unnecessary for the prosecution to prove that the prisoner acted maliciously or with any special intent; it is enough that he has inflicted "actual bodily harm." This phrase denotes a less degree of harm than "grievous bodily harm." Any injury calculated to interfere with the health or comfort of the person injured is actual bodily harm, though it be only of a merely temporary character.

5. To assault any person with intent to commit felony is a misdemeanour punishable with imprisonment for two years.[4] On an indictment for this offence the prisoner can be convicted of a common assault.

6. It is also a misdemeanour punishable on indictment with imprisonment for two years for any one to assault or obstruct any of the following officers or persons—

(a) a police constable in the execution of his duty;[4]

(b) a clergyman or minister when officiating, or about to officiate, at any religious service;[5]

(c) a magistrate or officer engaged in preserving a vessel in distress or any goods cast up on shore from a wreck;[6]

(d) a poor law officer or any person acting in his aid.[7]

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[1] *R.* v. *Martin* (1881), 8 Q. B. D. 54.
[2] *R.* v. *Halliday* (1889), 61 L. T. 699.
[3] 24 & 25 Vict. c. 100, s. 47.
[4] *Ib.* s. 38.
[5] *Ib.* s. 36.
[6] *Ib.* s. 37.
[7] 13 & 14 Vict. c. 101, s. 9; 14 & 15 Vict. c. 105, s. 18.

In addition to the grave assaults mentioned above, which are triable on indictment at the Assizes or Quarter Sessions, the Legislature has given to justices of the peace wide powers of dealing with less serious assaults. In some cases the same offence may be dealt with either summarily or by way of indictment. Thus, to assault or obstruct a police officer in the execution of his duty has, as we have seen, been indictable since the year 1861; but many recent statutes have enabled magistrates to deal summarily with the same offence and sentence the offender to a term of imprisonment not exceeding six months or to impose a fine not exceeding £20.[1]

Again, an assault on any female or on any boy under fourteen, which is of such an aggravated nature that, in the opinion of the justices, it cannot be sufficiently punished under the provisions as to common assaults, is called an aggravated assault. This offence is triable summarily either upon the complaint of the party aggrieved or otherwise, and the accused on conviction may be fined £20 (including costs) or sent to prison for six months.[2] But he may elect to be tried on indictment, and he may then be sentenced to one year's imprisonment.[3]

If a husband be convicted on indictment of any assault, or summarily of an aggravated assault, on his wife and be sentenced to a fine of more than £5 or to imprisonment for a term exceeding two months, the Court[4] or magistrate can grant her a separation order, which will have the force and effect of a decree of judicial separation, and may also give to the wife the legal custody of the children of the marriage while under the age of sixteen, and order the husband to pay her a sum not exceeding £2 a week for maintenance.[5]

Lastly, any common assault may be dealt with summarily, and here the procedure more nearly approaches the trial of a civil action. For in the first place, the proceedings can only be instituted "by or on behalf of the party aggrieved;"[1] though if the party aggrieved is unable from idiocy, infancy or any other cause to make complaint, it may be made by a friend acting on his behalf. Again, the magistrates have power to award compensation to the party aggrieved so as to obviate the necessity for any subsequent civil proceeding.[2] Nevertheless, the proceedings are in their essence criminal, for the magistrates can on conviction sentence the defendant to imprisonment with or without hard labour for two months, or impose a fine not exceeding £5, or order him to enter into recognizances to keep the peace and in either case to pay the costs of the proceeding. There are, however, two kinds of assaults which cannot be dealt with summarily by magistrates but which must be tried on indictment, *viz.*, an assault in which any question arises as to the title to land or as to any bankruptcy or insolvency, and an assault which is accompanied by an attempt to commit a felony.[3]

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[1] See, for instance, 34 & 35 Vict. c. 112, s. 12, and 45 & 46 Vict. c. 50, s. 195.
[2] 24 & 25 Vict. c. 100, s. 43.
[3] 42 & 43 Vict. c. 49, s. 17.
[4] For an instance in which a judge of assize exercised this power, see *R.* v. *Knowles* (1901), 65 J. P. 27.
[5] 58 & 59 Vict. c. 39, s. 4.

An assault is both a tort and a crime. Hence the person assaulted may either prosecute or bring a civil action, or do both. But a criminal Court will not pass judgment while a civil action is pending.[4] If, however, summary proceedings are taken before a magistrate, and the defendant either pays the penalty or suffers the imprisonment imposed on him, he is released from all further proceedings either civil or criminal for the same cause.[5] But it is only the person who is actually convicted that is released; and so where a servant was convicted of an assault committed in the course of his master's employment, it was held that such conviction did not release the master from liability to an action for damages for such assault.[6] Moreover, after hearing a case of common assault on the merits, the justices must, on demand, grant the accused a certificate that he was either convicted or acquitted; and that certificate is a bar to any subsequent civil or criminal proceeding (except a prosecution for murder or manslaughter, if the person assaulted subsequently dies).[1] Such a certificate is a bar even to an action by a husband for a doctor's bill and other expenses caused by an assault committed on his wife by the defendant.[2]

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[1] 24 & 25 Vict. c. 100, s. 42.

[2] Probation of Offenders Act, 1907 (7 Edw. VII. c. 17), s. 1.

[3] 24 & 25 Vict. c. 100, s. 46.

[4] *R.* v. *O'Gorman Mahon* (1836), 4 A. & E. 575.

[5] 24 & 25 Vict. c. 100, s. 45.

[6] *Dyer* v. *Munday*, [1895] 1 Q. B. 742.

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[1] *R.* v. *Morris* (1867), L. R. 1 C. C. R. 90.

[2] *Masper and wife* v. *Brown* (1875), 1 C. P. D. 97.

CHAPTER VII.

RAPE AND INDECENT ASSAULTS.

ANY person who has carnal knowledge of a woman without her consent is guilty of the felony of rape, and liable on conviction to be sent to penal servitude for life.[1] The crime is not triable at Quarter Sessions.

The act must take place without the consent of the prosecutrix, *e.g.*, by force[2] or by drugging her. If, however, the act took place with her consent, it will still be rape provided such consent was obtained by the accused either putting her in fear of bodily harm or practising some fraud upon her; for in such case her consent to the act cannot be called a real consent. For example, if a man has intercourse with a woman by pretending that he is performing a medical operation upon her,[3] or if a man induces a married woman to permit him to have connection with her by personating her husband, he is guilty of rape.[4]

The act is clearly committed without the consent of the woman if she be asleep[5] or insensibly drunk.[6] Although having carnal knowledge of a girl under the age of sixteen is a misdemeanour whether she consent or not, a person who has such carnal knowledge without her consent can also be convicted of rape.

The slightest penetration is sufficient to complete the offence.[7] If this be not proved, the jury may find the prisoner guilty of an attempt to commit rape, or of an offence under the Criminal Law Amendment Act, 1885, or of an indecent assault.[1]

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[1] 24 & 25 Vict. c. 100, s. 48. See indictment, No. 26, in the Appendix.
[2] *R.* v. *Jones* (1861), 4 L. T. (O. S.) 154.
[3] *R.* v. *Flattery* (1877), 2 Q. B. D. 410.
[4] 48 & 49 Vict. c. 69, s. 4.
[5] *R.* v. *Young* (1878), 14 Cox, 114.
[6] *R.* v. *Camplin* (1845), 1 Cox, 220.
[7] 24 & 25 Vict. c. 100, s. 63; and see *R.* v. *Hughes* (1841), 2 Moo. C. C. 190; 9 C. & P. 752.

Sir Matthew Hale, C. J., said of a charge of rape, "It is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."[2] So much depends on the credibility of the woman on whom the offence is alleged to have been committed. It is not essential in law that her testimony should be corroborated, though of course it is most desirable that any corroboration which there may be should be laid before the jury. As a rule, no third person is present at the time; yet corroboration may be afforded by the manner and appearance of the prosecutrix, the state of her clothes, and what she said to any persons whom she met shortly after the offence. If she made no complaint to such persons, this fact will tell in favour of the prisoner. If a medical examination took place shortly afterwards, the evidence of the medical man who conducted it will be most material. Again, the soil of the place where the offence is alleged to have been committed may show indications of a struggle. It may be important also to inquire whether such place was remote and solitary, and whether her cries, if she had made any, could have been heard. The conduct of the prisoner may also be material, *e.g.*, if he fled from his home immediately after the occurrence. The act, if done without consent, is equally a rape, although the prosecutrix be a common prostitute or the mistress of the prisoner. Such facts, however, will operate strongly with the jury on the question as to whether she really consented or not.

Evidence may be given to show that the prosecutrix is of generally immoral character.[3] She may be asked whether she has had connection with other men, but the prisoner is bound by her answer and cannot call evidence to contradict her.[4] She may further be asked whether she has had connection with the prisoner on other occasions, and if she denies this, evidence may be called to contradict her.[5]

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[1] 48 & 49 Vict. c. 69, s. 9.

[2] 1 Hale, 635.

[3] *R.* v. *Tissington* (1843), 1 Cox, 48.

[4] *R.* v. *Holmes* (1871), L. R. 1 C. C. R. 334.

[5] *R.* v. *Riley* (1887), 18 Q. B. D. 481.

On an indictment for rape the prisoner's wife is, even without his consent, a competent witness for the prosecution as well as for the defence.[1]

If the prosecutrix made a complaint to a third person shortly after the alleged offence was committed, such person will be a very important witness for the prosecution. Such a witness may not only be asked whether a complaint was made, but also as to the particulars of the complaint; and this evidence is admissible, not as evidence of the truth of the alleged charge, but as corroborating the credibility of the prosecutrix, and as enabling the jury to judge for themselves whether the conduct of the prosecutrix is consistent with her testimony on oath. If, therefore, the defence suggested in cross-examination of the prosecutrix is that her whole story is a fabrication concocted for the purpose of blackmail or the like, the words of her complaint may be given in evidence. So may they, if she has sworn in chief that she did not consent, and in cross-examination it is sought to prove that she did consent, whether it is essential for the prosecution to establish a want of consent or not. But it is still doubtful whether the terms of the complaint are admissible if the defence be mistaken identity, even though in her complaint she named her assailant.[2]

The fact that the prisoner elects to give evidence, and swears that the prosecutrix consented to the connection, is not such an "imputation on her character within the Criminal Evidence Act, 1898,[3] as will entitle the prosecution to prove that the prisoner has been previously convicted."[4] "To say that a man who, in clearing himself, alleges consent on the part of the prosecutrix brings himself within section 1 of the Criminal Evidence Act, 1898, is to my mind a total subversion of the principle of the Act. It is otherwise if he goes out of his way to make an attack upon the prosecutrix, founded on matters outside the pith and substance of the charge. The statement that the prosecutrix consented is a defence to the charge. The prisoner must not be prevented from denying on his oath that what he did was against her consent."[1]

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[1] Crim. Law Amendt. Act, 1885, s. 20, and 61 & 62 Vict. c. 36, s. 4.

[2] *R.* v. *Lillyman*, [1896] 2 Q. B. 167; *R.* v. *Osborne*, [1905] 1 K. B. 551; *R.* v. *Norcott*, [1917] 1 K. B. 347.

[3] 61 & 62 Vict c. 36, s. 1 (f) (ii.).

[4] *R.* v. *Sheean* (1908), 72 J. P. 232.

Lastly, it should be noticed that a boy under fourteen cannot be convicted of rape,[2] or of an attempt to rape, or of an assault with intent to commit rape;[3] for the law presumes that he is physically incapable of committing the crime; and this presumption cannot be rebutted by any evidence that he was in fact physically capable of committing it.[4] He can, however, be convicted of an indecent assault.[5] A husband cannot commit this crime upon his wife.[6] But both a boy under fourteen, and a husband,[7] and even a woman,[8] can be convicted as principals in the second degree.

Any person, who unlawfully and carnally knows any girl under the age of thirteen years, is guilty of felony and liable to be kept in penal servitude for life. Any attempt to commit this offence is a misdemeanour punishable with imprisonment with or without hard labour for two years. On an indictment for this offence the prisoner may be convicted of an indecent assault, or of procuring connection by threats or by false pretences, or of having carnal knowledge of a girl between thirteen and sixteen years old.[9] The age of the girl must be strictly proved.[10] If the prisoner is a boy under sixteen years of age, he can be whipped or sent to a certified reformatory school. If the prosecutrix is too young to understand the nature of an oath, she may be allowed to give unsworn evidence; but in this case her evidence must be corroborated in some material particular implicating the accused.[11] The fact that she consented is no defence. Any person, whether owner, occupier or in control of any premises, who allows a girl to be upon such premises for the purpose of being carnally known by any man, is liable to be sent to penal servitude for life, if the girl is in fact under thirteen years of age; if she is over thirteen but under sixteen, he is liable to be imprisoned with or without hard labour for two years. But in each case it will be a sufficient defence for the prisoner to show that he or she had reasonable cause to believe that the girl was of or above the age of sixteen.[1]

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[1] *Per* Jelf, J., 72 J. P. at p. 232.

[2] 1 Hale, 630.

[3] *R.* v. *Eldershaw* (1828), 3 C. & P. 366; *R.* v. *Waite*, [1892] 2 Q. B. 600.

[4] *R.* v. *Philips* (1839), 8 C. & P. 736; *R.* v. *Jordan* (1839), 9 C. & P. 118.

[5] Crim. Law Amendt. Act, 1885, s. 9.

[6] 1 Hale, 629; but see *R.* v. *Clarence* (1889), 22 Q. B. D. 23.

[7] 1 Hale, 629, 630; *R.* v. *Williams*, [1893] 1 Q. B. 320.

[8] *R.* v. *Ram* (1893), 17 Cox, 609, 610, n.

[9] Crim. Law Amendt. Act, 1885, s. 9.

[10] *R.* v. *Rogers* (1914), 111 L. T. 1115; and see *post*, p. 1093.

[11] Crim. Law Amendt. Act, 1885, s. 4.

"Any person, who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years, shall be guilty of a misdemeanour" and liable to be imprisoned with or without hard labour for two years. But it is a sufficient defence to this charge if the prisoner can show that he had reasonable cause to believe, and did in fact believe, that the girl was above the age of sixteen.[2] The fact that she consented is immaterial. No prosecution can be commenced for this offence more than six months after the commission of it.[3]

The same punishment is awarded to "any person, who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile."[3]

"Whosoever shall be convicted of any indecent assault upon any female" is liable to be imprisoned for two years with or without hard labour.[4] The offence is a misdemeanour. Where the female assaulted is under the age of thirteen years, the fact that she consented is immaterial.[5] So, too, consent by a boy under that age is no defence to a charge of indecent assault; and where the boy is above that age, it must be remembered that mere submission is not consent.[6]

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[1] Crim. Law Amendt. Act, 1885, s. 6. See *R.* v. *Webster* (1885), 16 Q. B. D. 134.

[2] *R.* v. *Banks*, [1916] 2 K. B. 621.

[3] Crim. Law Amendt. Act, 1885, s. 5, as amended by 4 Edw. VII. c. 15, s. 27. See *R.* v. *Tyrell*, [1894] 1 Q. B. 710.

[4] 24 & 25 Vict. c. 100, s. 52.

[5] 43 & 44 Vict. c. 45, s. 2.

[6] *Ib.*, and 24 & 25 Vict. c. 100, s. 62. See *R.* v. *Day* (1841), 9 C. & P. 722; *R.* v. *Lock* (1872), L. R. 2 C. C. R. 10.

CHAPTER VIII.

ROBBERY AND PIRACY.

ROBBERY is the unlawful taking possession of the goods of another by means of violence or threats of violence, used with the object of obtaining those goods from the owner, without his consent and with the intention of depriving him permanently of all the benefits of his ownership.

Robbery is felony punishable with penal servitude for fourteen years,[1] and is triable at Quarter Sessions. But if the prisoner was armed or was accompanied by another, or if he used any personal violence at the time of or immediately before or immediately after such robbery, he may be sentenced to penal servitude for life; a male robber may also be once privately whipped.[2] These latter cases of robbery cannot, of course, be tried at Quarter Sessions.

Robbery is an aggravated form of larceny;[3] but as the gist of the offence is the violence done to or reasonably apprehended by the person robbed, it falls under the head of offences against the person rather than under that of offences against property. Larceny from the person is stealing from the person without the use of violence or threats.

On an indictment for robbery the prosecution must prove—

(i.) that the prisoner used violence or menaces

(ii.) with the object of obtaining possession of the goods in question;

(iii.) that he did obtain possession of them

(iv.) from the person, or at least from the immediate presence, of the prosecutor;

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[1] Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 23 (2).

[2] S. 23 (1), and see *R* v. *Swenson and Caba* (1918), 13 Cr. App. R. 209. As to an assault with intent to rob, see s. 23 (3), *ante*, p. 321.

[3] Robbery includes larceny; see *R.* v. *McGrath* (1869), L. R. 1 C. C. R. 205, followed in *R.* v. *Lovell* (1881), 8 Q. B. D. 185. See the indictment in the Appendix, No. 27.

(v.) that he so obtained them against the will of the prosecutor by means of actual violence or by reason of the fear of violence inspired by his conduct, and

(vi.) that he intended to deprive the prosecutor permanently of all the benefits of his ownership.

(i.) To constitute robbery there must be violence or a reasonable apprehension of violence at the time the goods are taken or extorted. It is enough if the prisoner's conduct is such as to inspire fear of violence in the mind of a person of ordinary firmness and courage. If violence be actually used, the prosecution need not prove that the prisoner's conduct was such as to inspire fear in any reasonable person. If the only violence used occurs accidentally and unintentionally in the prisoner's efforts to obtain possession of the property, the offence is larceny from the person and not robbery. But if violence is necessary to enable the prisoner to obtain possession of the property, and the prisoner on discovering this intentionally resorts to violence with that object, this is robbery.

Thus, the snatching of a purse from a prosecutor, who is unaware of what is happening until after the purse has gone from his possession, cannot amount to robbery; but it will be otherwise if the prisoner does something to put the prosecutor in bodily fear before snatching the purse, for here the fear precedes the taking.[1]

So, if the prisoner obtains possession of the property without actual violence or threats of violence, the crime is only larceny from the person, unless the prisoner immediately after taking possession of the property uses personal violence.

Again, where the prisoner seized the prosecutor's watch and, on finding that it was secured by a chain round his neck, violently pulled and jerked it till it broke, and then ran away with the watch, this was held to amount to robbery.[2]

(ii.) The prosecution must prove that the violence or threats of violence used by the prisoner were used with the intention of gaining possession or of compelling the prosecutor to give up possession of the goods. A merely accidental or unintentional injury will not support an indictment for robbery. Thus, if a thief in cutting off a gentleman's seals were to scratch or cut his hand, he could not be convicted of this offence.

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[1] *R.* v. *Harman* (1620), 1 Hale, P. C. 534.

[2] *R.* v. *Mason* (1820), R. & R. 419.

(iii.) The goods must come into the possession of the thief. It does not matter if the time during which they were in his possession was exceedingly short; but the prosecution must prove that at some particular moment the prisoner had possession of them.

Thus, in an old case a thief snatched a lady's earring out of her ear with such violence that he tore her ear; he was immediately arrested and searched, but no earring was found in his possession. When the lady reached her home, she found it in her back hair. This was held to amount to robbery, because the thief had had possession of the earring, although only for a moment.[1] But where a thief, snatching at a lady's purse, knocked it on to the ground and was arrested before he could pick it up, it was held that he had not committed robbery; for he never had possession of the purse.[2]

(iv.) Next, the taking must be from the person, or from the immediate presence of the prosecutor, as where a railway thief strikes a passenger in the face and snatches his bag from the seat beside him.

(v.) The prisoner must obtain the goods either by actual violence or by such conduct as would reasonably inspire fear of violence in a person of ordinary firmness and courage. It is not necessary for the prosecution to prove that the individual prosecutor was actually in fear of the individual prisoner; the guilt of the prisoner does not depend upon the nerve of the prosecutor, but upon the effect which his actions and conduct would have upon the mind of an ordinary man or woman. Moreover the prisoner must, of course, take possession of the goods against the will of the prosecutor. If the latter gave up his goods willingly, no crime is committed unless his willingness was induced simply by fear of a greater evil.

Thus, where a man arranged to have himself made the victim of a highway robbery in order to claim a Government reward, the prisoners were rightly acquitted; for the prosecutor had parted with his property willingly and not through fear of any violence.[3]

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[1] *R.* v. *Lapier* (1784), 2 East, P. C. 557, 708; 1 Leach, 320.
[2] See *R.* v. *Farrell* (1787), 1 Leach, 322, n. (b).
[3] *R.* v. *MacDaniel* (1756), 19 St. Tr. 745.

(vi.) Lastly, the jury must be satisfied that in obtaining the goods the prisoner had a criminal intent—in short, that he meant to steal them. Thus, if the prisoner honestly believes the goods in question to be his own and obtains possession of them by menaces, he commits the tort of trespass but not the crime of robbery.[1]

On an indictment for robbery the prisoner can also be convicted either of an attempt to rob, which is a common law misdemeanour, or of an assault with intent to rob, which is a statutory felony. Every assault with intent to rob is an attempt to rob, but not every attempt to rob is an assault with intent to rob; for an attempt to rob may be made by other means than an assault. An assault with intent to rob is punishable with penal servitude for five years; or, if the robber be armed or accompanied by another person, he may be sentenced to penal servitude for life and also to be once privately whipped.[2] To satisfy the statute there must be an assault, but there need not be a battery. The intent to rob is, as a rule, evidenced by a demand for money or other valuable property from the prosecutor; but this is not essential, as other circumstances of the case may satisfy the jury that the prisoner did intend to rob. On an indictment for an assault with intent to rob, it has been held that the prisoner cannot be convicted of a common assault, because one is a felony and the other a misdemeanour.[3]

By section 30 of the Larceny Act, 1916, it is a felony punishable with five years' penal servitude to demand anything capable of being stolen with menaces or by force with intent to steal the same.[4] By the Post Office Act, 1908,[5] it is a felony punishable with penal servitude for life for any one to stop a mail with intent to rob or search it. The same maximum punishment attaches to the felony of inducing another by violence or threats to execute deeds, &c., with intent to defraud.[1]

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[1] *R.* v. *Hall* (1828), 3 C. & P. 409.

[2] S. 23 (1) (a) and (3).

[3] *R.* v. *Woodhall* (1872), 12 Cox, 240. It may be doubted whether this case still holds good since the Indictments Act, 1915.

[4] 6 & 7 Geo. V. c. 50. See also s. 29. As to the meaning of "menaces" in these sections, see *R.* v. *Boyle and Merchant*, [1914] 3 K. B. 339.

[5] 8 Edw. VII. c. 48, s. 50 (d).

Robbery committed on the high seas is called piracy Piracy is a crime both by the law of nations, from which it has been transferred into our common law, and by statute.[2]

Various acts, which do not amount to piracy at common law, have been made piracy by statute; as, for instance, rendering assistance to a pirate, or boarding a merchant ship and destroying her goods.[3] Penal servitude for life is generally the utmost punishment that can be inflicted on a pirate; but if his piracy was accompanied by violence and bloodshed he can be hanged, although he may not have taken any one's life.[4] Trafficking in slaves is also a crime against the law of England,[5] punishable with penal servitude for life.[6] A British seaman who serves on board a ship engaged in the slave trade is guilty of a misdemeanour.[7]

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[1] Larceny Act, 1916, s. 29 (2).

[2] 11 Will. III. c. 7, ss. 7—10; Piracy Acts, 1717—1837 (4 Geo. I. c. 11; 8 Geo. I. c. 24; 18 Geo. II. c. 30; 7 Will. IV. & 1 Vict. c. 88).

[3] 8 Geo. I. c. 24, s. 1; made perpetual by 2 Geo. II. c. 28.

[4] 7 Will. IV. & 1 Vict. c. 88, ss. 2, 3.

[5] Slave Trade Act, 1824 (3 Geo. IV. c. 113), s. 9.

[6] 7 Will. IV. & 1 Vict. c. 91, s. 1.

[7] See 36 & 37 Vict. c. 88, and *R.* v. *Zulueta* (1843), 1 C. & K. 215.

BOOK II.—PART IV.

OFFENCES AGAINST PROPERTY.

CHAPTER I.

LARCENY.

OUR law has ever been vigilant to protect the rights of property. In ancient times excessive rigour prevailed. Even at the commencement of the last century any one who forged a bank note was hanged. If a man stole any property valued at five shillings—if he stole anything above the value of one shilling from the person—or anything at all, whatever its value, from a bleaching ground—he was hanged. But this severity has been greatly relaxed, though at the same time many new offences have been created with the object of protecting property and punishing fraud.

Of offences against property, that which most frequently occurs is larceny or stealing.

Larceny.

Larceny is the wilful and wrongful taking possession of and carrying away the goods of another without his consent, with intent to deprive him of all benefits of his ownership. The law on this subject has now been codified by the Larceny Act, 1916.[1] The definition of stealing given in this Act is as follows:—

> "A person steals who, without the consent of the owner, fraudulently[2] and without a claim of right made in good

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[1] 6 & 7 Geo. V. c. 50. Henceforth in this chapter the phrase "the Larceny Act" is used to denote the Act of 1916, and references to sections without mention of any Act are references to sections in this Act.

[2] We venture to regret the use of the word "fraudulently" in this definition. It seems to imply that goods cannot be stolen openly and undisguisedly so that the owner knows what is taking place.

> faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:
>
> Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner" (s. 1 (1)).
>
> "Stealing for which no special punishment is provided under this or any other Act for the time being in force shall be simple larceny and a felony punishable with penal servitude for any term not exceeding five years, and the offender, if a male under the age of sixteen years, shall be liable to be once privately whipped in addition to any other punishment to which he may by law be liable" (s. 2).

Where, however, the stealing is attended with circumstances of aggravation, severer punishments can be imposed.[1]

The Larceny Act also contains the following important provisions:—

(i.) to steal or to rip, cut, sever or break with intent to steal any glass or woodwork belonging to any building or any fixture, fence, &c., is felony punishable as simple larceny (s. 8 (1));

(ii.) to steal or sever with intent to steal any ore, coal, &c., from a mine is felony punishable by imprisonment not exceeding two years (s. 11);

(iii.) to steal any will, codicil or other testamentary instrument, either of a dead or a living person, is felony punishable with penal servitude for life (s. 6);

(iv.) to steal the whole or any part of any document of title to lands is felony punishable by penal servitude for five years (s. 7);

(v.) to steal any horse, cattle or sheep is felony punishable with penal servitude for fourteen years (s. 3);

(vi.) to steal or to cut, break, root up or otherwise destroy or damage with intent to steal trees or shrubs, &c., of the value of £1 growing in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to a dwelling-house, or of the value of £5 if growing elsewhere, is felony punishable as simple larceny (s. 8 (2));

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[1] See Aggravated Larceny, *post*, p. 356.

(vii.) to steal or destroy or damage with intent to steal plants, roots, fruit or vegetable productions growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse or conservatory, is now a crime. A first offence of this kind is only punishable on summary conviction; any subsequent offence of the same kind is a felony and punishable as simple larceny (s. 8 (3)). But to steal or destroy or damage with intent to steal cultivated roots or plants, used for the food of man or beast, growing in any land open or enclosed, other than any of the places specified above, is a crime only punishable summarily, however often the offence is repeated.[1]

SIMPLE LARCENY.

In order to convict a prisoner of simple larceny the prosecution must prove six things:—

I. That the goods are of such a nature that they can be stolen.

II. That the goods were in the possession of the person named in the indictment as their owner.

III. That the prisoner took the goods out of the possession of the owner into his own possession.

IV. That the prisoner took the goods out of the possession of the owner without his consent.

V. That the prisoner, when he took possession of the goods, had the wrongful intention of depriving the owner permanently of the benefits of his ownership.

VI. That the prisoner not only took possession of the goods, but also carried them away.

I.

"Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen:

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[1] 24 & 25 Vict. c. 96, s. 37.

Provided that—

(a) save as hereinafter expressly provided with respect to fixtures, growing things and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof; and

(b) the carcase of a creature wild by nature and not reduced into possession while living shall not be capable of being stolen by the person who has killed such creature, unless after killing it he has abandoned possession of the carcase" (s. 1 (3)).

Hence now any tangible chose in action can be the subject of larceny. A mere abstraction, such as a debt, cannot of course be stolen; but any written evidence of a debt or of its payment, certificates of shares or other valuable securities can now be stolen.

It is of course impossible to steal things which are not the property of any one, *e.g.*, a corpse,[1] treasure trove, things derelict,[2] air, gas, electricity or running water. But when confined in pipes or tanks by human art or industry, air, gas, electricity [3] and running water become private property, and can therefore be stolen.

We proceed to deal with the two exceptions in the proviso of section 1 (3) set out above, both of which are survivals of the common law.

(a) "*Fixtures, Growing Things and Ore from Mines.*"

No man can steal land; hence the common law regarded it as impossible for a man to steal anything which was part of, or attached to, or "savoured of" land. Hence fixtures or materials used in a building, coal or ore in a mine, growing trees, shrubs, plants, roots or grass were not the subjects of larceny at common law. It is true that all these become personal property as soon as they are severed from the soil, and until they are severed they cannot, of course, be carried away. Nevertheless, the man who severed them and carried them away was not deemed to have committed larceny, a result, no doubt, of the extreme severity with which larceny was punished in former days. And this still remains law.

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[1] See *Williams* v. *Williams* (1882), 20 Ch. D. 659. For this reason body-snatchers of the olden days were indicted for stealing the shroud which enveloped the corpse.

[2] See *ante*, p. 20.

[3] S. 10.

Thus, if things which are attached to the land or to any building are severed from the realty with the intention of being illegally carried away, the person who severs them cannot be convicted of larceny; they have never come, as chattels, into the possession of the owner of the realty. If, however, after severing them he intentionally abandons them, they come into the possession of the owner; and if the man who severs them returns on a subsequent occasion and takes them away, he can be convicted of larceny, because the severance and the taking away are distinct and separate acts and do not form part of the same continuous transaction. Thus a man, who rips bell-wires or lead piping from an empty or unfinished house and carries them away, cannot be convicted of larceny. But it is larceny if a man pulls out bell-wires in sheer wantonness and leaves them lying in an empty house, and then, as the result of an afterthought, returns and takes them away. *A fortiori*, if they are removed by some one else who finds them lying loose in the house.

(b) *Wild Animals.*

Wild animals, such as deer, hares, rabbits, fish, birds, &c., were not, whilst alive and free, subjects of larceny at common law. They are nobody's property until they are killed, tamed or confined. As soon as any such wild animal is killed, it becomes the property of the owner of the soil on which it is killed. To this rule there is one exception: if the owner of the soil has conferred upon another the right of killing deer or game thereon, such deer or game, when killed, will be the property of that other.[1]

No one can be convicted of stealing even a dead wild animal, if it has never yet come into the possession of any one. If the man who killed it did so with the felonious intention of taking possession of it and carrying it away, then it never comes into the possession of the owner, and therefore it cannot be stolen from him. This is so even where the dead animal is not carried away at once, provided its subsequent removal was part of one continuous transaction with the killing. The man who kills the game and picks it up is the first possessor of it.[1] If he, after killing it, leaves it concealed on the soil, not with the intention of abandoning the possession, but intending to return and take it away when it should be convenient for him to do so, then, if he afterwards takes it away, he is not guilty of larceny; the killing and taking away are deemed one continuous act, although an appreciable time may have intervened.[2] If, however, the man who kills a wild animal makes no attempt to take possession of it, but leaves it with the intention of abandoning it, then it comes into the possession of the owner of the land on which it fell dead without any act of taking possession on his part, and if the man who killed it, or any third person, subsequently carries it away, he is guilty of larceny. And now by section 4 of the Larceny Act, 1916, "every person, who wilfully kills any animal with intent to steal the carcase, skin or any part of the animal killed, shall be guilty of felony."

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[1] *Blades* v. *Higgs* (1865), 31 L. J. C. P. 286; Ground Game Act, 1880 (43 & 44 Vict. c. 47).

Again, an animal wild by nature may be tamed; it may be either confined, or so far reclaimed that it does not desire to escape from its captor's premises. Such animals thus become private property. Hence pheasants reared in a coop can be stolen,[3] and swans, if branded with their owner's mark; and, by a curious survival of Roman law, so can bees, unless they swarm beyond pursuit. Such animals are regarded as being under the care and dominion of their owner.

Tame animals are private property from the time of their birth. But the common law did not regard them as of sufficient importance to be the subject of a prosecution for larceny, unless they were good to eat, or produced food, or were capable of drawing a cart, plough or some other vehicle or useful implement. Thus a horse, sheep or cow, or any domestic animal which laid eggs or gave milk, could be stolen, but not a dog, cat, parrot or canary.

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[1] A person, who has no right of shooting over the land, does not by merely killing or wounding a wild animal reduce it into his possession: *R.* v. *Roe* (1870), 11 Cox, 554, 557.

[2] *R.* v. *Townley* (1870), L. R. 1 C. C. R. 315; *R.* v. *Petch* (1878), 14 Cox, 116; and see *R.* v. *Read* (1878), 3 Q. B. D. 131; *R.* v. *Stride and Millard*, [1908] 1 K. B. 617.

[3] *R.* v. *Cory* (1864), 10 Cox, 23.

The common law rule as to such animals still holds good on any indictment for ordinary larceny, but the Larceny Act, 1861, contains provisions (which are still in force) which minimise the inconvenience resulting from the rule. Thus by sections 12 and 13 to "unlawfully and wilfully course, hunt, snare or carry away, or kill or wound, or attempt to kill or wound, any deer," which is kept in the enclosed part of any forest, chase or purlieu, or in any enclosed land where deer are usually kept, is made a felony punishable with imprisonment for two years; if, however, the deer be in an unenclosed place, a first offence is punishable summarily by magistrates with a fine not exceeding £50, a second offence is an indictable felony punishable with imprisonment for two years. Section 17 of the same Act makes it a criminal offence to unlawfully and wilfully take or kill any hare or rabbit, or to set or use any snare or engine for the taking of hares or rabbits in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be enclosed or not. The punishment varies according to the hour of the day or night at which the offence is committed. To steal any dog is now a crime. A first offence of this kind is only punishable on summary conviction;[1] but any subsequent offence is an indictable misdemeanour punishable with imprisonment for eighteen months.[2] Fish in any water, oysters, and birds and animals ordinarily kept in a state of confinement or for any domestic purpose, are similarly protected by ss. 21, 24 and 26 of the Act of 1861.

The Night Poaching Act, 1828,[3] the Game Act, 1831,[4] and the Poaching Prevention Act, 1860,[5] contain many provisions for the preservation of game and the punishment of poachers; one of these has been already mentioned in an earlier chapter among offences against the public peace.[6] No prosecution will lie at common law for a mere trespass. Trespass in pursuit of game, as defined by the Game Act, 1831, and trespass in pursuit of woodcocks, snipes, quails and landrails, are made criminal offences by section 30 of that Act;[7] trespass in pursuit of any other bird is in England merely a civil wrong, for which only an action for damages will lie.

II.

The prosecution must prove that the goods were in the possession of the person named in the indictment as their owner. Such person need not, however, be the legal owner of the goods. Against a thief, possession is *primâ facie* ownership. But a mere right to possession is not—in prosecutions for larceny, at all events—equivalent to possession.

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[1] Larceny Act, 1861, s. 18.

[2] Larceny Act, 1916, s. 5 (1).

[3] 9 Geo. IV. c. 69.

[4] 1 & 2 Will. IV. c. 32.

[5] 25 & 26 Vict. c. 114.

[6] See *ante*, p. 184.

[7] To constitute an offence under this section there must be a personal entry by the trespasser; sending a dog on to the land of another is not within the section (*Pratt* v. *Martin*, [1911] 2 K B 90).

Possession, as we have seen,[1] is mainly a matter of personal control It is a physical fact, and an obvious one; it is wholly distinct from ownership, which is often a difficult question of law. A man is in possession of a chattel whenever he has full and uncontrolled physical dominion over it. He is in possession of any chattel which is in the custody of his family or servants. If he goes away with his family and servants and leaves his furniture in his empty house, he would still be held to be in possession of that furniture, if such absence was only temporary, or if he could return and re-enter the house whenever he chose. But the moment any one else enters the house and carries off any article of furniture without his consent, his possession is at an end; for two persons cannot be in possession of the same property at the same time, unless they be partners or joint occupiers.

Thus, spoons or boots which a servant cleans in his master's house are all the time in the master's possession. If he steals them, it is larceny by a servant; if a third person steals them, they should be described in the indictment as the property of the master, and not of the servant.[2]

Again, if a thief goes to a restaurant, and pockets the knife, fork or spoon, which is laid before him, he commits larceny; for the restaurant keeper still had possession of it till the thief pocketed it. So, too, if A. walks with B. in order to carry his bag to the station, and runs away with it, he commits larceny; for the bag was still in B.'s possession while they were walking together.

A lady, wishing to get a railway ticket and finding the booking-office very crowded, asked a man who was nearer to the pay-place than she was to get a ticket for her, and handed him the money. He accepted it, intending to steal it, and immediately ran away with it. It was held that he was guilty of larceny at common law; for the lady being present retained the dominion and possession of the money in point of law after she had handed it to him.[3]

Again, if the owner of a chattel delivers it to an independent person—not a servant of his—with whom he has a contract relating to that chattel of such a kind that the other party to the contract is entitled to withhold possession of it from the owner until a certain event happens (*e.g.*, until he is paid some money), then the owner has parted with his possession, and the independent contracting party is in possession of that chattel. Take, for instance, a bailment. A bailment exists whenever the owner of goods voluntarily hands over possession of them to another person, not his servant, upon a trust or under a contract that the other shall do something with or to the goods and then return them to the owner or deliver them to his order; and the person to whom the goods are entrusted is called a bailee. A married woman or an infant can be a bailee.[1] Such relations very frequently occur, *e.g.*, where the owner of goods entrusts them to a friend for safe keeping, or to a carrier for carriage, or to a pawnbroker in pawn. If the goods be stolen out of the possession of the bailee by some third person, either the bailor or the bailee may be described in the indictment as their owner. The bailee in such a case has a "special property" in the goods, and may therefore be described in the indictment as their owner.

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[1] *Ante*, p. 19.
[2] See *R.* v. *Pearson* (2) (1908), 72 J. P. 451.
[3] *R.* v. *Thompson* (1862), 32 L. J. M. C. 53.

If, however, the goods were taken out of the possession of the bailee by the bailor himself, it will not of course be larceny, unless the bailee had a right to retain possession of them as against the bailor, in which case it will be larceny and the bailee himself should be described in the indictment as the owner.

"The expression 'owner' includes any part owner or person having possession or control of, or a special property in, anything capable of being stolen."[2]

Thus, it is possible for a man to be convicted of stealing his own property. For example, if A. pawned goods to a pawnbroker and subsequently stole them without redeeming them, he would be guilty of larceny; for they were in the possession of the pawnbroker. Again, if a man purchased goods on the terms that they were to be paid for on or before delivery and subsequently contrived to obtain possession of them surreptitiously without paying for them, he can be indicted for stealing them from the vendor, although the property in them had passed to himself.[3] But if the goods, though sold upon such terms, were voluntarily delivered by the vendor to the purchaser, no subsequent dealing with them by the purchaser can amount to larceny, even though they are never paid for. *A fortiori*, if the goods were sold and delivered to him on credit.

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[1] *R.* v. *Jane Robson* (1861), 31 L. J. M. C. 22.

[2] S. 1 (2) (iii.).

[3] *R.* v. *Cohen* (1851), 2 Den. C. C. 249; *R.* v. *Campbell* (1827). 1 Moo. C. C. 179.

Again, a question sometimes arises as to whether the stolen goods should be described in the indictment as the property of a husband or of his wife. The fact that goods were in the husband's house is some evidence that the goods were his property; but if they are in fact the separate property of his wife, they should be described as her property—and this, whether she is residing with her husband or not.[1] For since the passing of the Married Women's Property Act, 1882,[2] it is quite possible for a married woman to have separate possession of a chattel apart from her husband, although they may live under the same roof. And now even her own husband can be convicted of stealing a married woman's separate property.[3]

From the above illustrations it is clear that it is not always a simple matter to lay the ownership of the stolen goods in the right person. The property may be laid in different persons in separate counts of the same indictment, *e.g.*, one count may describe the vendor, and another count the purchaser, as the owner of the goods. The judge, moreover, has power to amend the indictment if it appears from the evidence that the person named in the indictment is not the true owner.[4]

III.

Next, the goods must be taken out of the possession of the owner, into the possession of the thief.[5] There must be a change of possession. The goods must pass into the independent physical control of the thief without the consent of the owner; and the thief must unlawfully assume dominion over them, *e.g.*, by placing them in his pocket, or even by grasping them in his hand.

This rule, that there can be no larceny without a change of possession, caused much difficulty in former days in cases where the property of a husband had been stolen from him by his wife. For at common law husband and wife were one person, and therefore her possession was still his possession; and so she could not steal his goods.[6] Further, if the goods of the husband were taken with the consent or privity of the wife, it was not larceny, unless the taker was the adulterer of the woman.[1] And it is still the law that no criminal proceedings can be taken by any husband against his wife, while they are living together, concerning any property claimed by him; nor, while they are living apart, as to any act done by the wife while they were living together concerning property claimed by the husband, unless such property has been wrongfully taken by the wife when leaving or deserting, or about to leave or desert, her husband.

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[1] *R.* v. *Murray and others*, [1906] 2 K. B. 385.

[2] 45 & 46 Vict. c. 75, s. 12; see *R.* v. *Payne*, [1906] 1 K. B. 97.

[3] See *infra*, and p. 346.

[4] *R.* v. *Murray and others*, [1906] 2 K. B. at p. 388.

[5] *R.* v. *Smith* (1852), 2 Den. C. C. 449.

[6] 1 Hale, 513; and see *R.* v. *Kenny* (1877), 2 Q. B. D. 307; *R.* v. *Creamer*, [1919] 1 K. B. 564.

A married woman can now enjoy separate property apart from her husband, and can have separate possession of it, so that he can steal it from her. But no criminal prosecution can be instituted by any wife against her husband, while they are living together, concerning any property claimed by her; nor, while they are living apart, as to any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.[2]

IV.

The state of mind of the owner of the goods at the moment of the alleged theft is important. The goods must be taken out of the possession of the owner without his consent. If he intends to part permanently with his property, the offence of larceny is not committed. If he is not aware that he is parting with the possession of the goods, there is, of course, no consent. Again, consent obtained by threats or intimidation, or by fraud, is no consent.[3] But if no fraud or artifice has been practised on the owner, and yet he consciously and voluntarily hands over his property to the prisoner, there can be no larceny; it is "a receipt and not a taking."[4] And now by section 1 (2) (i) of the Larceny Act, 1916, "the expression 'takes' includes obtaining the possession—

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[1] *R.* v. *Flatman* (1880), 14 Cox, 396.

[2] Married Women's Property Act, 1882, ss. 12, 16; Larceny Act, 1916, s. 36. As to the form of the indictment, see *R.* v. *James and Johnson*, [1902] 1 K. B. 540.

[3] *R.* v. *McGrath* (1869), L. R. 1 C. C. R. 205, followed in *R.* v. *Lovell* (1881), 8 Q. B. D. 185.

[4] Coke, 3 Inst. 107; and see *R.* v. *Mucklow* (1827), 1 Moo. C. C. 160.

> (*a*) by any trick;
>
> (*b*) by intimidation;
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> (*c*) under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained;
>
> (*d*) by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps."

In *R.* v. *Middleton*[1] the prisoner was a depositor in the post office savings bank in which 11*s.* stood to his credit. He gave notice in the ordinary form to withdraw 10*s.*, stating in his notice the number of his deposit book and the amount to be withdrawn. A warrant for 10*s.* was thereupon issued to him, and a letter of advice was sent to the post office at Notting Hill to pay him 10*s.* He went to that office and handed his deposit book and the warrant to the clerk. The clerk referred by mistake to a letter of advice for £8 16*s.* 10*d.*, and placed this sum upon the counter for the prisoner to take up. He took up the money and went away; and the jury found that at the moment of taking it up he had the felonious intention of stealing it. On these facts the Court for Crown Cases Reserved held by a majority of eleven judges to four that, although the prisoner had done nothing to induce the mistake of the clerk, he had committed larceny, for he knew when he took up the coins that he had no right to do so. Such a case clearly comes within the clause of the Larceny Act, 1916, set out above, as to knowingly taking advantage of a mistake.

In *R.* v. *Ashwell*,[2] the prisoner asked the prosecutor for the loan of a shilling in the yard of a public-house at about eight o'clock at night; the prosecutor gave him a sovereign believing it to be a shilling, and the prisoner took it under the same belief. Subsequently, however, he discovered the mistake, and fraudulently appropriated the sovereign to his own use. On the above facts it was unanimously determined that the prisoner had not been guilty of larceny as a bailee; but the Court were equally divided upon the question whether or no he was guilty of larceny at common law; and so the conviction stood.

This decision led to much discussion, and the better opinion was that he was entitled to an acquittal. The prosecutor consented to part with the coin which he handed to Ashwell. The change of possession was his act and took place with his entire consent. He intended to part with his whole property in that coin. He mistook its value, it is true; but Ashwell had done nothing to induce the mistake.[3] Moreover, Ashwell had no "intent, at the time of such taking, permanently to deprive the owner" of the sovereign, as is required by section 1 (1) of the Larceny Act, 1916.

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[1] (1873), L. R. 2 C. C. R. 38.

[2] (1885), 16 Q. B. D. 190.

[3] See the decision in this case discussed in *R.* v. *Flowers* (1886), 16 Q. B. D. 643, and *post*, p. 351.

In *R.* v. *Hehir*,[1] where the facts were almost precisely similar, the Irish Court for Crown Cases Reserved quashed a conviction for larceny, although the nine judges were divided almost equally closely, four judges being in favour of the conviction.

Larceny by a Trick.

If the prisoner intends to steal a chattel, and with that object fraudulently induces the owner of the chattel to part with possession of it, he is guilty of larceny by a trick, if the owner has no intention of transferring his property in it to him. If the owner intends to part with his property as well as his possession, the crime may be false pretences; it is not larceny.[2] But if the owner consents to give up possession only, and that consent is obtained by fraud, the prisoner is guilty of larceny.[3] "It has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner, and therefore in one sense the taking of the possession was not against his will, yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is sufficient taking."[4]

In some cases of larceny by a trick the owner does not know that it is his property that he is parting with—as, for instance, where the prisoner says to A., "Kindly pass me my hat," and points to A.'s own hat, which A. hands him, believing it to be the prisoner's. And whenever the owner does not understand what is going on, so that his mind does not go with his act, he does not really consent to the prisoner's taking possession of his goods.

In other cases the owner is induced by the prisoner to part with possession temporarily or conditionally, but does not intend to part with his property. It is no defence to a charge of larceny that the goods alleged to have been stolen were delivered in pursuance of a contract between the prisoner and the prosecutor, if that contract was a mere pretence or fraud upon the prosecutor—part of a scheme for feloniously getting possession of his property; for so obtaining the goods is larceny by a trick.[1]

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[1] (1895), 18 Cox, 267 (Ir.).

[2] But he may be convicted of false pretences, although indicted for larceny (see s. 44 (3), *post*, p. 356).

[3] This distinction is discussed in the chapter on False Pretences, *post*, p. 370.

[4] *Per cur.* in *R.* v. *Middleton* (1873), L. R. 2 C. C. R. at p. 43.

Where the prisoner tries a horse which he is pretending to buy, or borrows one to ride for a couple of hours, and does not return it, he commits larceny by a trick. It will be otherwise, if the jury are satisfied that he always meant to return it sooner or later.

Thus, in *R.* v. *Buckmaster*[2] the prosecutor made a bet upon a horse-race with the prisoner and left the amount of the bet with him as a deposit. The prisoner lost the bet; and when subsequently asked to pay he denied that he had made the bet. The Court for Crown Cases Reserved held that there was evidence to go to the jury that the prisoner had fraudulently received the money, never intending to repay it in any event, and was, therefore, rightly convicted of larceny by a trick.

In *R.* v. *McKale*,[3] A. and B. together went into the shop of the prosecutrix. A. put down sixpence in silver and sixpence in copper, and asked the prosecutrix for a shilling in change. She took a shilling from the till and placed it on the counter beside the sixpence in silver and the sixpence in copper. A. then said that she might as well give him a florin and take it all. She took a florin from the till and placed it on the counter, expecting to receive two shillings of A.'s money in exchange. Just then B. distracted her attention by asking the price of some article, and A. went away with the florin. It was held that A. was guilty of larceny, for the prosecutrix never intended to part with her property in the florin until she had received two shillings of the prisoner's money in exchange for it.

Larceny by a Bailee.

The rule that no larceny could be committed where the owner of the goods consents to their receipt by the prisoner created difficulties in cases of bailment.[4] If the bailee appropriated to his own use the goods entrusted to him by the bailor, he was not guilty of larceny at common law; for the legal possession was in the bailee, and he had acquired it innocently.[5] If, however, a bailee dishonestly severed into separate parts the goods bailed to him, he was said to "break bulk;" the bailment at once terminated, and the subsequent appropriation of any part of the goods by him was larceny at common law.

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[1] *R.* v. *Bramley* (1861), L. & C. 21; *R.* v. *Edmundson* (1913), 8 Cr. App. R. 107.

[2] (1887), 20 Q. B. D. 182.

[3] (1868), L. R. 1 C. C. R. 125.

[4] The nature of a bailment has been already defined: *ante*, p. 27.

[5] But if he had fraudulently induced the owner to entrust him with the goods in order that he might steal them, he would, as we have just seen, be guilty of larceny by a trick.

But it was provided by section 3 of the Larceny Act, 1861 (now repealed), that "whosoever, being a bailee of any chattel, money or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny;" and now by section 1 (1) of the Larceny Act, 1916, if a bailee fraudulently converts any article entrusted to him to his own use, or the use of any person other than the owner, with the intention of permanently depriving the bailor of it, he is guilty of larceny.

The word "bailment" was construed strictly; it was held that a person is not a bailee, unless he is under obligation to return the identical chattel deposited with him to its owner or to deliver it to his order.[1] A question soon arose in the case of a bailee entrusted with goods for sale. Of course, if he misappropriated these before he sold them, he was guilty of larceny as a bailee. But if he sold the goods and subsequently misappropriated the proceeds, it was difficult to see how he could be convicted of any kind of larceny; for the proceeds never were in the possession of the bailor and never were entrusted by him to the bailee. It was, however, decided that a bailee of goods for sale might be deemed to be a bailee of the proceeds of their sale, whenever it was his duty, according to the terms of his employment or the usual course of business in the trade, to hand over the actual proceeds to the owner of the goods as and when he received them.[2] If it was not inconsistent with his duty for him to pay the proceeds into his own bank or to use the money for his own purposes at the moment, and subsequently to remit to the bailor the price less commission and expenses, then there was no criminal liability; it was merely a matter of bookkeeping, and the only remedy of the bailor was an action of debt or of account. Hence the necessity for the statute, 1 Edw. VII. c. 10, which is now incorporated in section 20 of the Larceny Act, 1916.[3]

If a bailee pawns the goods bailed, his act does not amount to larceny if he can show that when he pawned the goods he honestly intended to redeem them subsequently and also that there was a reasonable likelihood of his having money to enable him to redeem them and restore them to the owner. But if he had merely a vague intention to redeem the goods at some future date when he might happen to be in funds, then he is guilty of larceny.

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[1] *R.* v. *Hassall* (1861), L. & C. 58; *R.* v. *Buckmaster* (1887), 20 Q. B. D. 182.

[2] *R.* v. *De Banks* (1884), 13 Q. B. D. 29; and see *R.* v. *Aden* (1873), 12 Cox, 512.

[3] This point is discussed *post*, ~~p. 336~~.
362.

V.

We have dealt with the state of mind of the owner of the goods. The state of mind of the prisoner is also most material. He must at the moment of taking possession of the goods have in his mind the intention of depriving the owner permanently of all benefits of his ownership. He must at that time intend to appropriate the goods to his own use, or to the use of some person other than the owner.[1] "The innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny. . . . To justify a conviction for larceny the receipt and appropriation must be contemporaneous."[2] A change in a man's mind *ex post facto* cannot "render an honest taking larceny."[3]

M. received a letter containing a cheque. The letter was addressed, and the cheque was payable, to another person of the same name as M. M. received the letter innocently, but on discovering the mistake converted the cheque to his own use. This is not larceny; for M. had no criminal intent at the time when he took possession of the letter.[4]

Flowers was in the employ of a firm of shoe manufacturers at Leicester, whose custom it was to send to each workman the amount of his wages in a sealed bag with the amount and the name of the workman written outside. Flowers and another workman called Jinks complained to the clerk that the amount paid them was short. Jinks handed back his bag unopened to the clerk. Flowers, who had already opened his bag and taken out its contents, handed in his bag torn and empty. The clerk consulted the cashier and discovered that Flowers was entitled to 3*d.* more than he had received; he brought him this 3*d.* and handed him at the same time by mistake Jinks' full bag instead of Flowers' empty bag. Flowers immediately went away. Yet the jury found that he did not know that the bag which the clerk handed to him did not belong to him at the time he received it from the clerk, but that, having received the bag and its contents innocently, he afterwards fraudulently appropriated them to his own use. The Court for Crown Cases Reserved quashed the conviction.[5]

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[1] This is called in the old books the *animus furandi*. And now see the Larceny Act, 1916, s. 1 (1).

[2] *Per* Lord Coleridge, C. J., in *R.* v. *Flowers* (1886), 16 Q. B. D. at p. 646.

[3] *Per* Alderson, B., in *R.* v. *Preston* (1851), 2 Den. C. C. at p. 360.

[4] *R.* v. *Mucklow* (1827), 1 Moo. C. C. 160; *R.* v. *Davies* (1856), Dearsl. 640.

[5] *R.* v. *Flowers* (1886), 16 Q. B. D. 643; cf. *R.* v. *Ashwell* (1885), 16 Q. B. D. 190, *ante*, p. 347.

Next, as to the nature of the criminal intention, which must exist in the prisoner's mind at the time he takes or receives the goods. He must wrongfully intend to deprive the owner permanently of all benefits of his ownership. If the goods were taken thoughtlessly or by way of joke or in mere mischief, or through an honest mistake, or under any "claim of right made in good faith,"[1] there is no *mens rea* and therefore no felony.

Thus, it is an ancient custom to allow gleaners to gather up what corn, &c., is left lying on the ground after the machines of the owner have taken the bulk of the crop; and they do so under a claim of right by old custom. So, too, it is no larceny for a sheriff to distrain on goods which he believes to belong to a judgment debtor, even though it be subsequently proved that the goods taken are not the property of the debtor, but of some innocent third party. If a claim of right be suggested, it is material to inquire whether the goods were taken surreptitiously. If the prisoner, when charged with stealing the goods, boldly admitted taking them, but claimed a right to do so, the jury will probably infer that he at any rate thought he was justified in taking them. But if the prisoner took them by stealth and afterwards denied taking them at all, and then at the trial set up the defence of a claim of right, the jury may infer that they were taken with a felonious intent. In such a case clear proof of subsequent dishonesty would be evidence from which dishonesty *ab initio* might be inferred.

Again, a mere intention to take away the owner's possession from him temporarily will not suffice. There must be an intention to deal with the thing stolen in a manner wholly inconsistent with the owner's right of property in it—either by appropriating it or destroying it. If, however, this felonious intent exists, the motive does not matter. The act need not be done for gain.[2]

Thus, to borrow a boat to escape in—even without the owner's leave—or to borrow a key in order to open a safe, and delay in returning it, would not constitute larceny. And where the finder of an article delays returning it to the owner in the hope that a reward will be offered, he commits no crime.

So where a glove stitcher takes back out of the stock gloves which she had previously stitched and been paid for, intending to bring them back in a few days and be paid for them over again, she does not commit larceny of the gloves.

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[1] Larceny Act, 1916, s. 1 (1).

[2] See *R.* v. *Cabbage* (1815), R. & R. 292.

And where the prisoner, who was employed in a tan-yard to dress leather, was indicted for stealing skins, and the jury found that he took them not with intent to sell or dispose of them, but with a view of bringing them back to his master, and charging him as if they had been dressed by himself, and so obtaining payment for dressing them, the Court held that the prisoner could not be convicted of larceny, because there had been no intent on his part to deprive the owner wholly of his property in the leather.[1]

So, too, if a servant takes a horse out of his master's stable, and turns it out into the road, with intent to obtain a reward the next day by bringing it back to his master, there would be no larceny.

Larceny by Finding.

The owner of a thing may deliberately throw it away with the intention of abandoning his property in it; and then any one who finds it may lawfully take possession of it. Again, a man may place a thing belonging to him in some place where he thinks it will escape observation, meaning shortly to return for it. Such an article still remains in his possession, and no one has a right to touch it. We have to deal under this heading with a third case. A man who is in possession of a thing may accidentally drop it, or in some other way unconsciously part with all control over it without the least intention of abandoning whatever property he has in it. In ordinary English, he cannot be said to be still in possession of it; he does not know where it is, or even that he has lost it. But, as against any wrongdoer, the law deems him still to be in possession of such lost property; and such constructive possession will continue until some other person takes actual possession of it.

Where one person finds in some place open to the public and appropriates to his own use the goods of another, such appropriation will amount to larceny, if the finder then "reasonably believes that the owner can be found," and yet takes the goods with the deliberate intention of keeping them for himself.[2] In deciding whether the accused had reasonable belief that the owner could be found, the jury will be mainly guided by his previous acquaintance with the ownership of the particular thing, the place where it was found, the nature of the marks upon it or the other circumstances of the particular case.

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[1] *R.* v. *Holloway* (1848), 1 Den. C. C. 370; cf. *R.* v. *Poole* (1857), Dearsl. & B. 345.

[2] *R.* v. *Thurborn* (1849), 1 Den. C. C. 387, 394, 396; and see the judgment of Stephen, J., in *R.* v. *Ashwell* (1886), 16 Q. B. D. at p. 215, and Larceny Act, 1916, s. 1 (2) (1) (d), *ante*, p. 347.

If the thing in question was in any private house or garden, or in any part of a post office, bank or shop to which the public have no right of access, no member of the general public would have a right to touch it; but other considerations arise if it is picked up in any public place, such as a highway or common, on the platform of a railway station or in a shop in front of the counter. Thus if a horse is found feeding on an open common or at the side of a public road, or a watch is found apparently hidden in a hay-stack, the taking of either would be larceny, because the taker could have no right to presume that the owner did not know where to find it.[1]

Where however a man finds a thing which has been lost, or which may reasonably be supposed by him to have been lost, and appropriates it, this is not larceny, if at the time when he takes possession of it he really believes that it is not in his power to ascertain by taking reasonable steps who the owner is. Again, it is not larceny if the thing was found in such a place and under such circumstances that the finder might reasonably presume that the owner had thrown it away and abandoned his property in it. The guilt or innocence of a prisoner must depend on what he reasonably supposed to be the facts of the particular case.[2]

Thus, if a man were to pick up in the street a bank-note marked with the owner's name, and take possession of it with the innocent intention of finding out the owner and restoring the note to him, he could not be convicted of larceny, if he subsequently changed his mind and converted the note to his own use.[3] There is a clear distinction between property which is lost and property which is merely put down and left by mistake under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. For instance, where the prosecutor, after making a purchase from the prisoner, left his purse on her stall and the jury found that she took up the purse knowing that it was not her own, and intending at that moment to appropriate the contents to her own use, the Court held that she was rightly convicted, as she had no reasonable grounds for believing that the owner could not be found.[1]

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[1] 1 Hale, P. C. 507.

[2] *R.* v. *Thurborn, suprà.*

[3] *R.* v. *Preston* (1851), 2 Den. C. C. 353.

Again, where a cabman abstracts the contents of a parcel which has been accidentally left in his cab by a passenger whose address he could easily ascertain, or where a tailor finds and applies to his own use a pocket-book left in a coat sent to him by a customer to be repaired, he commits larceny. So if a man, who had bought a desk at an auction, discovered valuables in it and appropriated them to his own use, he would be guilty of larceny, if he had no ground for supposing that he had bought the contents, and had reason to think that the owner could be discovered.[2]

VI.

Lastly, the prisoner must carry away the thing which he is accused of stealing. This is technically called "asportation." He must do something more than merely take possession of it; otherwise he will be guilty only of an attempt to commit larceny. But the least removal will suffice, provided every atom of the thing is removed an appreciable distance from the place which it previously occupied. It is not necessary that the thief should make off with it. Where, however, the thing is so fastened or secured that it cannot be completely removed without breaking a cord or otherwise severing the fastening, merely shifting its position without releasing it will not amount to larceny. In order to render the asportation in such cases complete, there must be a severance. The law on this point is well and succinctly stated in the Larceny Act, 1916: "The expression 'carries away' includes any removal of anything from the place which it occupies, but in the case of a thing attached only if it has been completely detached."[3]

Thus, if a man be apprehended in the act of leading another's horse out of a field; if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; or if gas or water be fraudulently abstracted from the main against the will and without the knowledge of the company who supply it—in any of these cases there is a sufficient asportation.[4]

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[1] *R.* v. *West* (1854), Dearsl. 402.

[2] *Cartwright* v. *Green* (1802), 8 Ves. 405; and see *Merry* v. *Green* (1841), 7 M. & W. 623.

[3] S. 1 (2) (ii.).

[4] As to gas, see *R.* v. *Firth* (1869), L. R. 1 C. C. R. 172; as to water, see *Ferens* v. *O'Brien* (1883), 11 Q. B. D. 21; as to electricity, see Larceny Act, 1916, s. 10.

So, too, where the prisoner moved a cask from one end of a cart to the other, intending to steal it, but was detected before he could carry it off, it was held that he was guilty of larceny.[1] On the other hand, to lift up a sack from a horizontal position and stand it up on end was held not to be a sufficient asportation.[2]

Where, however, the prisoner lifted a pocket-book half-way out of the prosecutor's pocket meaning to steal it, and being surprised in the act let it fall back again, it was held that that was a sufficient asportation to convict him of the full offence.[3]

But where a man in a shop snatched up a parcel which was attached to the counter by a string, so that it could not be taken out of the shop without cutting or breaking the string, which he had not done, it was held that he could be convicted only of an attempt to commit larceny.[4]

A count for simple larceny may be inserted in an indictment for any aggravated larceny, *e.g.*, in a dwelling-house or by a servant. This is not, however, necessary, as the prisoner may be convicted of simple larceny on a count for aggravated larceny. A count is usually added for receiving the same goods knowing them to have been stolen. It is not "necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property." [5]

On an indictment for larceny a man can be convicted of embezzlement or of an attempt to commit larceny. If he is indicted for larceny and his offence proves to be in law false pretences, he cannot be convicted of larceny; but he may be convicted of false pretences, although the false pretences are not set out in the indictment.[6] If he is indicted for false pretences and his offence proves to be in law larceny, he can nevertheless be convicted of false pretences.[7] This distinction is no doubt due to the old rule of practice at common law that a prisoner indicted for a lesser offence could never be convicted on that indictment of a graver offence.

AGGRAVATED LARCENY.

Certain kinds of larceny are regarded by the law as more heinous than others. They are known as "aggravated larcenies," because in addition to all the elements of simple larceny they are attended by special circumstances which aggravate the offence. The maximum punishment for these felonies is penal servitude for fourteen years. If, however, the prosecution fails to prove the special circumstances which aggravate the offence, the prisoner may be found guilty of simple larceny. These aggravated larcenies are as follows :—

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[1] *R.* v. *Walsh* (1824), 1 Moo. C. C. 14.
[2] *R.* v. *Cherry* (1781), 2 East, P. C. 556.
[3] *R.* v. *Thompson* (1825), 1 Moo. C. C. 78; *R.* v. *Taylor*, [1911] 1 K. B. 674.
[4] *Anon.* (1782), 2 East, P. C. 556; *R.* v. *Wilkinson* (1598), *ib.*, and 1 Hale, 508.
[5] Rule 6 (1) under the Indictments Act, 1915 (5 & 6 Geo. V. c. 90).
[6] S. 44 (3).
[7] S. 44 (4).

1. Stealing to the value of ten shillings any woollen, linen, hempen or cotton yarn, or any goods or article of silk, woollen, linen, cotton, alpaca or mohair, or any one or more of those materials mixed with each other or with any other material, whilst laid, placed or exposed in any place during the progress of manufacture (s. 9).

2. Stealing in any dwelling-house any chattel, money or valuable security to the value of £5, or of any value if any person therein be put in bodily fear by any menaces or threats used (s. 13).[1]

3. Stealing any chattel, money or valuable security from the person of another (s. 14).

4. Stealing any goods in any vessel, barge or boat in any haven, port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal, or from any dock, wharf or quay adjacent thereto (s. 15).

5. Stealing any part of any vessel in distress, or wrecked, stranded or cast on shore, or any goods, merchandise or articles of any kind belonging to such vessel (s. 15).

6. Larceny by a clerk or servant, or one employed in the capacity of a clerk or servant, of any chattel, money or valuable security belonging to or in the possession of his master or employer (s. 17 (1)).[2]

7. Larceny by any one employed in the public service of His Majesty or in the police of any chattel, money or valuable security belonging to or in the possession of His Majesty, or entrusted to or received into possession by the offender by virtue of his employment (s. 17 (2)).

And, lastly, with reference to offences connected with the Post Office, " every person who—

(1) steals a mail-bag ; or

(2) steals from a mail-bag, post office, officer of the Post

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[1] As to stealing by a tenant or lodger, see s. 16.

[2] See indictment, No. 15, in the Appendix.

Office or mail, any postal packet in course of transmission by post; or

(3) steals any chattel, money or valuable security out of a postal packet in course of transmission by post; or

(4) stops a mail with intent to rob the mail;

shall be guilty of felony and on conviction thereof liable to penal servitude for life."[1] "Every person who, being an officer of the Post Office, steals or embezzles a postal packet in course of transmission by post shall be guilty of felony and on conviction thereof liable—

(a) if the postal packet contains any chattel, money or valuable security, to penal servitude for life:

(b) in all other cases to penal servitude for any term not exceeding seven years."[2]

Any one who "knowingly and wilfully aids, abets, counsels, procures or commands the commission of an offence" against the Larceny Act, 1916, may be indicted and tried as a principal offender.[3]

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[1] S. 12, re-enacting the Post Office Act, 1908 (8 Edw. VII. c. 48), s. 50.

[2] S. 18; and see 8 Edw. VII. c. 48, s. 55.

[3] S. 35.

CHAPTER II.

EMBEZZLEMENT, &c.

THE crime of embezzlement is closely analogous to larceny. It is committed where a clerk or servant unlawfully appropriates to his own use money or goods received by him for or on account of his employer or master. The exact language of the statute[1] is as follows:—"Every person who, being a clerk or servant, or person employed in the capacity of a clerk or servant, fraudulently embezzles the whole or any part of any chattel, money or valuable security, delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, shall be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding fourteen years." Boys under sixteen years of age may be once privately whipped in addition to any other punishment which the Court may award. Embezzlement is an offence distinct from larceny, from which it differs in two important particulars:—

(i.) The crime of embezzlement can only be committed by "a clerk or servant" or by one who is "employed in the capacity of a clerk or servant," whereas any one can be guilty of larceny.

(ii.) The prisoner must take possession of the property and convert it to his own use before it comes into the possession of the prosecutor. If the property has come into the possession, actual or constructive, of the prosecutor before the prisoner converts it to his own use, the offence is not embezzlement but larceny by a clerk or servant.

(i.) The first essential, then, is that the prisoner must be the "clerk or servant," or a person "employed in the capacity of a clerk or servant," of the person whose goods he embezzles.

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[1] 6 & 7 Geo. V. c. 50, s. 17 (1). See indictment, No. 9, in the Appendix.

The question as to who is a clerk or a servant has given rise to much discussion.

It has been decided that where the servant works is not the test, nor whether he is bound to give his whole time to such work, nor even whether he is paid by salary or commission, or both, or neither—though these may be important factors in determining the question. The test is, is he bound to obey the orders of his master so as to be under his control, not only as to what he has to do, but also as to how he is to do it?[1] If so, he is a clerk or servant and can be convicted of embezzlement. If, on the other hand, he is free to do the work when and how he pleases, he is not a clerk or servant but an independent contractor.

If the prisoner was never employed by the prosecutor except on the one particular occasion on which he misappropriated the property, the better opinion is that he was not a clerk or servant; but the point is not free from doubt.[2] It seems clear, however, that if a man is asked by a friend to do something for him as a favour (*e.g.*, to fetch a parcel for him from a railway station because the friend is ill), and he consents to oblige him, but misappropriates the property received, he is not guilty of embezzlement; for he neither is a clerk or servant, nor is he employed as such. He could, however, now be convicted of fraudulent conversion under section 20 of the Larceny Act, 1916.

(ii.) Next, the prisoner must receive the property before it comes into the master's actual possession. His receiving it may be a good discharge to the person from whom he receives it, so that the property passes to the master. But as between the accused and his master the property must not yet have come into the master's possession. If after the property has come into the possession of the master the servant misappropriates it, he is guilty of larceny by a servant.

This was decided in *Reed's Case* so long ago as 1853.[3] There the prisoner had been sent by his master, with a cart belonging to the latter, to fetch coals from the wharf of a coal company with whom the master usually dealt. On his way back with the coals the prisoner without any authority disposed of a quantity of them to a third person. The constructive possession of the coals by the master had here commenced at the moment when they were placed in his cart, so that there was a subsequent taking of the coals out of his possession by the prisoner, whose intention was beyond all question felonious.

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[1] *R.* v. *Negus* (1873), L. R. 2 C. C. R. 34.

[2] *R.* v. *Nettleton* (1830), 1 Moo. C. C. 259; *R.* v. *Goodbody* (1838), 8 C. & P. 665; *contrà, R.* v. *Hughes* (1832), 1 Moo. C. C. 370.

[3] Dearsl. 168, 257.

Again, where a butler, who had the care and custody of his master's plate, received plate from the silversmith for his master at his master's house, and afterwards fraudulently converted it to his own use before it had in any way, other than by his act of receiving it, come into possession of his master, he was found guilty of larceny.[1] But if a servant, whose duty it is to receive property for and on behalf of his master, converts it to his own use while it is merely on the way to his master, he is guilty of embezzlement.

The term "embezzlement" is also used to cover other offences of a like nature committed by persons in fiduciary positions, *e.g.*, trustees, public officers, &c. Thus any one who fraudulently converts to his own use (or that of some third person) the whole or any part of the property of which he has been appointed in writing a trustee[2] for the benefit of another is guilty of a misdemeanour and may be sent to penal servitude for seven years.[3] But no prosecution can be commenced under this section without the leave of the Attorney-General, or, where civil proceedings have been taken by the same person, without the leave of the judge who tried the case or before whom it is pending. The section covers trusts for public or charitable purposes.

Again, any banker, merchant, broker, attorney or other agent, who has been entrusted with any money or security for the payment of money with directions in writing as to its application, and who fraudulently converts the same to his own use or in any other way contrary to such directions, is guilty of a misdemeanour and subject to the same maximum punishment. And so is he, if he sells, negotiates, transfers, pledges or in any manner converts to his own use or benefit any chattel, property, valuable security or power of attorney for the sale or transfer of any stocks or shares with which he has been entrusted for safe custody or for any special purpose without any authority to sell, negotiate, transfer or pledge the same.[1]

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[1] *R.* v. *Watts* (1850), 2 Den. C. C. 14; *R.* v. *Cooke* (1871), L. R. 1 C. C. R. 295, 300.

[2] There is a very wide definition of the word "trustee" in s. 46 of the Larceny Act, 1916.

[3] *Ib.*, s. 21.

Falsification of Accounts.

It was found that the path was often prepared for acts of embezzlement and other frauds by false entries being made by a clerk in the ledgers and other books of account of his employer, and also that such dishonest practices were often after their commission cloaked or concealed by similar fraudulent entries. Hence in the year 1875 an Act[2] was passed which makes the falsification of such books of account, with intent to defraud, a crime in itself, whether any pecuniary loss is thereby occasioned to the prisoner's employer or not. It enacts that any clerk or servant or the officer of any company or corporation, who wilfully and with intent to defraud destroys, alters, mutilates or falsifies any book, paper or account belonging to or in the possession of his employer, or makes false entries therein, is guilty of a misdemeanour and liable to seven years' penal servitude.[3] Falsifying the mechanical means whereby an account is brought into existence, such as a taximeter, is falsifying an account within the meaning of this Act.[4] But it is no offence under this Act for the servant of A., with however fraudulent an intent, to make false entries in the books of B.[5]

Fraudulent Conversion.

Later it became necessary to pass another Act to deal with certain cases of fraudulent misappropriation, which did not clearly fall within the legal definition of either of the crimes larceny or embezzlement. If a factor or other agent, who is entrusted with goods for sale, converts them to his own use before any sale is effected, he is clearly guilty of larceny by a bailee. If he sells the goods and appropriates the proceeds, his liability to be convicted of larceny of the proceeds depends, as we have seen,[1] on the question whether it was or was not his duty, according to the terms of his employment or the usual course of business in the trade, to hand over the actual proceeds to the owner of the goods as and when he received them. If it was not inconsistent with his duty for him to pay the proceeds into his own bank or to use the money for his own purposes at the moment, and subsequently to remit to the owner the price less commission and expenses, then there was no criminal liability; it was merely a matter of account, and the only remedy of the owner was a civil action. This was the case, although the agent intended to misappropriate the proceeds at the time when he received them—unless, indeed, he had fraudulently induced the original bailment with the deliberate intention of stealing the proceeds. He could not be convicted of larceny, because the proceeds never were in the possession of his principal; he could not be convicted of embezzlement, because he was not a clerk or servant.[2]

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[1] See ss. 75 and 76 of the Larceny Act, 1861, which are not repealed, and ss. 20 and 22 of the Larceny Act, 1916.

[2] 38 & 39 Vict. c. 24. See indictment, No. 11, in the Appendix.

[3] As to false entries or alterations in the books of the Bank of England or of the Bank of Ireland, see 24 & 25 Vict. c. 98, s. 5, which is not repealed by the Forgery Act, 1913.

[4] *R.* v. *Solomons*, [1909] 2 K. B. 980.

R. v. *Palin*, [1906] 1 K. B. 7.

No one can be guilty of embezzlement unless he is either "a clerk or servant or employed in the capacity of a clerk or servant." A third person, who receives goods or money for a friend not in the course of any employment, cannot be convicted of embezzlement if he fraudulently appropriates the property which he so receives. But both these cases, and no doubt many others, were met by section 1 of the Larceny Act, 1901,[3] which has been repealed and re-enacted by the Larceny Act, 1916. Section 20 (1) (iv.) of the latter Act makes it a misdemeanour punishable with penal servitude for seven years for any one—

(a) who is entrusted with any property in order that he may retain it in safe custody, or apply, pay or deliver the property, or any part thereof, or any proceeds thereof, or

(b) who has received any property for or on account of any other person,

to fraudulently convert the property, or any part thereof, or any proceeds thereof, to his own use or benefit, or to the use or benefit of any other person. This offence cannot be tried at Quarter Sessions.[1]

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[1] *Ante*, p. 350.

[2] *Ante*, p. 350.

[3] 1 Edw. VII. c. 10. See the indictment in the Appendix, No. 13.

It will be observed that the Act does not make such fraudulent conversion larceny; it creates a new misdemeanour, punishable, however, with greater severity than the felony of simple larceny. It is not necessary that the prisoner should be entrusted with the property by the owner personally or receive it directly from him; it is sufficient if he has in fact assumed possession of the goods under circumstances which make it a possession for or on account of the owner.[2]

Thus, where the proprietor of a taxicab delivers it to a driver for the purpose of his plying with it for hire upon the terms that the driver will hand over to him a certain percentage of the day's takings while retaining the balance for himself, it is competent for the jury to find that, to the extent of the proprietor's share, the fares received by the driver from the public are received by him for or on account of the proprietor within the meaning of the Act.[3]

Prevention of Corruption.

A third new crime of this class was created in 1906. In that year was passed the Prevention of Corruption Act,[4] which enacts that:—"If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

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[1] S. 38 (b).
[2] *R.* v. *Grubb*, [1915] 2 K. B. 683.
[3] *R.* v. *Messer*, [1913] 2 K. B. 421.
[4] 6 Edw. VII. c. 34; and see 52 & 53 Vict. c. 69 and 6 & 7 Geo. V. c. 64.

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;[1]

he shall be guilty of a misdemeanour, and shall be liable on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and such fine, or on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding fifty pounds, or to both such imprisonment and such fine."[2]

A prosecution for an offence under this Act cannot be instituted without the consent of the Attorney-General or Solicitor-General. No indictment under this Act can be tried at Quarter Sessions; nevertheless a Court of Quarter Sessions may hear and determine an appeal from a summary conviction under this Act.[3]

"The expression 'consideration' includes valuable consideration of any kind; the expression 'agent' includes any person employed by or acting for another; and the expression 'principal' includes an employer. A person serving under the Crown or under any corporation or any municipal, borough, county or district council, or any board of guardians, is an agent within the meaning of this Act."[2]

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[1] See *Sage* v. *Eichholz* (1919), 35 Times L. R. 382.

[2] 6 Edw. VII. c. 34, s. 1.

[3] *Ib.* s. 2.

CHAPTER III.

FALSE PRETENCES AND OTHER FRAUD.

ANY person, who with intent to defraud makes a representation as to some matter of fact which he knows to be untrue and thereby induces another to part with any chattel, money or valuable security,[1] is guilty of the misdemeanour of obtaining such property by false pretences, and liable on conviction to penal servitude to the extent of five years. This offence can be tried on an indictment either at Assizes or Quarter Sessions; and since 1899 it can in certain cases be also dealt with summarily by justices of the peace.[2]

Section 32 of the Larceny Act, 1916, runs as follows :—

"Every person who, by any false pretence—

(1) with intent to defraud, obtains from any other person any chattel money or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person ; or

(2) with intent to defraud or injure any other person, fraudulently causes or induces any other person—

(a) to execute, make, accept, endorse or destroy the whole or any part of any valuable security ; or

(b) to write, impress or affix his name or the name of any other person, or the seal of any body corporate or society, upon any paper or parchment in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security ;

shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding five years."

In dealing with this offence we must consider several points. In the first place the representation made by the prisoner need not always be expressed in words. It is sufficient if it can be reasonably and naturally inferred from his acts or conduct. Whether it can be so inferred is a question of fact for the jury to decide. It is not necessary that the words or that the acts should be capable only of the meaning charged in the indictment;[1] it is sufficient if they did in fact convey that meaning to the prosecutor. "A representation must depend upon what a man says or does, and what his words and acts would convey to the mind of another. It cannot depend upon the state of his own mind."[2]

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[1] The phrase "valuable security" has a very wide meaning; it is defined by s. 1 of the Larceny Act, 1861, which is not repealed by the Act of 1916.

[2] See Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22).

If A. tacitly consents to a representation made by B., which A. knows to be false and by means of which something is obtained from C., A. may be held guilty of false pretences by conduct.[3] If a person obtains goods from another by giving him in payment a cheque upon a bank at which he has no account, he can be indicted for false pretences; for his act in giving the cheque is a representation by conduct that the cheque is a good and valid order for the payment of its amount.[4] If, however, the accused at the time he gives the cheque has good ground for believing that the cheque will be paid on presentation, he cannot be convicted of false pretences; for in that case there is no intent to defraud.[5]

Again, it was held that a person, who, though not a member of the University, entered a shop at Oxford in cap and gown and obtained goods on credit, was guilty of false pretences; for his conduct in assuming such a costume amounted to a representation that he was a member of the University.[6]

So a person, who fraudulently obtained goods by sending to the vendor the half of a bank note, having previously parted with the corresponding half to a third person, was convicted of false pretences; for by sending the half-note he represented that he still held the corresponding half and was ready and able to forward it to the vendor.[7]

But in *R.* v. *Jones*[8] the prisoner's conduct was held not to amount to a representation sufficient to justify the jury in finding that he had obtained goods by false pretences. The prisoner in that case entered a restaurant and ordered a meal. He made no verbal representation at the time as to his ability to pay, nor was any question asked him with regard to it. After the meal he said that he was unable to pay, and that he had (as was the fact) only one halfpenny in his possession. At the trial he was convicted of obtaining goods by false pretences, and also of obtaining credit by fraud under section 13 of the Debtors Act, 1869.[1] The Court for Crown Cases Reserved quashed the former conviction, but affirmed the latter.

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[1] *Per* Lush, J., in *R.* v. *Cooper* (1877), 2 Q. B. D. at p. 514; and see *R.* v. *Foster*, *ib.* 301.

[2] *Per* Brett, J., in *R.* v. *Hazelton* (1874), L. R. 2 C. C. R. at p. 139.

[3] *R.* v. *Grosvenor* (1914), 111 L. T. 1116.

[4] *R.* v. *Hazelton, suprà.*

[5] *R.* v. *Walne* (1870), 11 Cox, 647.

[6] *R.* v. *Barnard* (1837), 7 C. & P. 784.

[7] *R.* v. *Murphy* (1876), 13 Cox, 298.

[8] [1898] 1 Q. B. 119.

A mere expression of opinion, however, is not a false pretence. A man, who by merely puffing his wares induces another to purchase them, cannot be convicted of false pretences, provided that such puffing does not amount to the assertion of a fact. For example, if he merely says that the spoons which he is offering for sale "are equal to Elkington's A.," that is a mere puff—a statement as to a matter of opinion. It would be otherwise if he had stated that they "are Elkington's A.;"[2] for this would be a misrepresentation of fact.

Again, the representation must be to the effect that a certain fact exists or has existed. "To be an indictable false pretence it must be in respect of a supposed present or past fact."[3] A man cannot be convicted for representing that he will do something, although he does not intend to do it.[4] To break such a promise may be a breach of contract; but a breach of contract is not a crime.[5] "A promise as to future conduct not intended to be kept is not in itself a false pretence."[6] Where, however, a man's promise or threat that he will do a thing implies a false representation that he now has the power to do that thing, an indictment will lie.

Thus, if the prisoner obtains goods from A. by promising to return on the next day and pay for them in cash, this is not a false pretence. But where a married man obtained money from a woman by threatening to bring an action for breach of promise of marriage against her, it was held that an indictment for false pretences would lie; for his threat to bring the action involved the false pretence that he was in a position to do so, that is, that he was unmarried.[7] So where a woman was deserted by her husband, and the prisoner obtained money from her by promising to bring her husband back to her "over hedges and ditches,"—it was held that the prisoner was rightly convicted; for by such promise she represented that she had the power to bring him back.[8]

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[1] See *post*, p. 374.
[2] *R.* v. *Bryan* (1857), 7 Cox, 313.
[3] *Per* Erle, C. J., in *R.* v. *Giles* (1865), 34 L. J. M. C. at p. 54.
[4] *R.* v. *Lee* (1863), 9 Cox, 304; *R.* v. *Speed* (1882), 46 L. T. 174.
[5] But see *ante*, pp. 106, 107.
[6] Summary Jurisdiction Act, 1899 (62 & 63 Vict. c. 22), s. 3.
[7] *R.* v. *Copeland* (1842), Car. & M. 516.
[8] *R.* v. *Giles* (1865), 34 L. J. M. C. at p. 54.

Next, the prosecution must prove that the representation was untrue, that the facts alleged never existed, and further that the prisoner knew that they never existed, and made the representation with the deliberate intent to defraud. The prosecution must satisfy the jury that such was the state of the prisoner's mind at the time when he made the false pretence.[1] To establish this, the prosecution is now allowed to give evidence of any similar false pretences made either previously or subsequently in order to obtain money or goods from other persons.[2]

But such evidence is not admissible where the other false pretences are different in their character from that charged in the indictment.

Thus where a man was convicted of obtaining a pony and cart by falsely alleging that he wanted them for his wife, who was an invalid, and that he had an account at Parr's Bank, Widnes, and evidence was admitted to show that about the same time he had obtained provender by falsely stating that he had stables and horses at Blackburn, the conviction was quashed.[3]

So where the prisoner was indicted for obtaining money from A. by falsely representing that he had paid on A.'s account larger sums than he had in fact paid, evidence that on other occasions he had obtained money from A. by falsely representing that certain china figures were genuine old Dresden china was held inadmissible.[4]

The prosecutor must be deceived by the misrepresentations made by the prisoner. If he knows them to be false and yet lets the prisoner have the goods, the latter cannot be convicted of the full offence,[5] but only of the crime of attempting to obtain goods by false pretences, which is a misdemeanour punishable by imprisonment to the extent of two years with hard labour.[6] In order to secure a conviction for obtaining goods by false pretences, the prosecution must show that it was the prisoner's statement which acted on the mind of the prosecutor, and induced him to part with his property. If the false pretence charged in the indictment be made after the prisoner has obtained possession of the goods or money, the prosecution will fail, for it is essential to prove that the goods or money were handed over on the faith of the false pretence charged. Thus, where the prisoner gave a false name and address, but did so after the goods had been delivered to him, it was held that he could not be convicted of obtaining the goods by means of the false name and address, which were the only pretences set out in the indictment.[1]

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[1] *R.* v. *Dunleavy* (1908), 73 J. P. 56.

[2] *R.* v. *Rhodes*, [1899] 1 Q. B. 77; *R.* v. *Ollis*, [1900] 2 Q. B. 758; *R.* v. *Wyatt*, [1904] 1 K. B. 188; and see Powell on Evidence, Book I., Chap. VI.

[3] *R.* v. *Fisher*, [1910] 1 K. B. 149; cf. *R.* v. *Baird* (1915), 84 L. J. K. B. 1785.

[4] *R.* v. *Ellis*, [1910] 2 K. B. 746.

[5] *R.* v. *Mills* (1857), 26 L. J. M. C. 79.

[6] Criminal Justice Administration Act, 1914, s. 16 (1); *R.* v. *Gould* (1918), 13 Cr App. Rep. 144.

Again, the prisoner cannot be convicted of the full offence of obtaining goods by false pretences, but only of an attempt to do so, where the prosecutor parts with the goods not in consequence of the false pretence, but from motives of charity or for some other reason independent of the false pretence charged.[2]

Lastly, the prosecutor must be induced by the prisoner's false pretences to part with some chattel, money or valuable security. If, in spite of the prisoner's fraudulent representations, the prosecutor does not part with anything, the prisoner can be convicted only of an attempt. The prosecutor must intend to part not only with possession of the goods, but with his whole property or other interest in them. This is the main distinction between larceny and false pretences. In larceny the owner of the thing stolen has no intention of parting with his property. In false pretences, on the other hand, the owner has the intention of divesting himself of his property; he parts with his goods voluntarily, being induced to do so by the prisoner's fraudulent statements. It does not matter whether in law the property in them actually passes or not; it is enough if the owner intends to part with his whole interest in the goods and expects never to have them returned to him.

"If a person through the fraudulent representations of another delivers him a chattel intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences."[3] "On the authorities it is settled law that if the owner of the goods or money parts with the possession, and does not intend to pass the property, and there is at the time an intention to steal in the mind of the person who obtains the possession, that is evidence of larceny."[1] "Where the owner of goods is, by a trick employed by a person *animo furandi*, induced to part with possession of the goods to that person, not intending to pass the property, . . . that is larceny by a trick."[2]

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[1] *R.* v. *Jones* (1884), 15 Cox, 475.
[2] *R.* v. *Light* (1915), 84 L. J. K. B. 865.
[3] *Per* Parke, B., in *Powell* v. *Hoyland* (1851), 6 Exch. 70; and see *R.* v. *Adams* (1812), R. & R. 225.

For example, if A. tells B.'s wife that B. has sent him to fetch his dressing-case, and B.'s wife, believing this statement, gives A. the case to carry to B., and A. converts it to his own use, A. is guilty of larceny by a trick. But if A. tells B.'s wife that he has won 10*s.* from B. on a bet, and that B. says she is to pay him that amount, and she, believing him, gives him the money, whereas no such bet was ever made and lost, A. is guilty of obtaining money by false pretences.

If C. obtains goods from D. on credit by falsely pretending that he was sent by E. to obtain those goods from D. for and on behalf of and on the credit of E., C. is guilty of false pretences and not of larceny. It is true that there is in this case no contract between D. and E., and therefore no sale of the goods to E.,[3] so that no property passes. Nevertheless D. intended to pass his whole property in the goods to E.: he never expected to see them back again in his shop.

Again, where A. is induced by false pretences to send goods to B. on sale or return, it is submitted that the case is not larceny by a trick; for A. intends to part with his property in all such goods as B. may retain, and leaves it to B. to decide whether he will retain all or any, and which, of the goods. So if B. falsely represents to the owner of an article that he has a customer who desires to purchase such an article, and thereby induces the owner to deliver to him that article on sale or return for the purpose of his endeavouring to get the supposed customer to buy it from him, the case is not one of larceny by a trick, but of obtaining goods by false pretences.[4]

"I think there is larceny by a trick where the owner of goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, but does not intend to pass the property in them, and the recipient has the *animus furandi*. . . . On the other hand, goods are obtained by false pretences where the owner of the goods, being induced thereto by a trick, voluntarily parts with the possession of the goods, and does intend to pass the property. . . . It is, I think, obtaining goods by false pretences where the owner, being induced thereto by a trick, voluntarily parts with the possession, and either intends to pass the property, or intends to confer a power to pass the property. If he gives, and intends to give, that power and the power is exercised, the person who takes under the execution of the power obtains the property not against, but by, the authority of the original owner, and none the less because the authority was obtained by fraud."[1]

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[1] *Per* Manisty, J., in *R.* v. *Buckmaster* (1887), 20 Q. B. D. at p. 187.

[2] *Per* Fletcher Moulton, L. J., in *Oppenheimer* v. *Frazer and Wyatt*, [1907] 2 K. B. at p. 73.

[3] *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459.

[4] *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463.

The rule of law is the same, but its application is not so simple, in cases where the prisoner obtains goods from a servant of the owner. Here it is not enough that the servant should intend to part with the property in the goods, but the master also must intend that the servant should so intend—in other words, he must have given the servant authority, actual or constructive, to part with the property in them when in his discretion he thought fit to do so.

Thus, if a shopman has authority to sell the goods in his master's shop either for cash or on credit, and X. by means of false pretences obtains goods on credit from the shopman in his master's absence, the crime is clearly false pretences; for both master and servant intended to pass the property in those goods to X. as well as the possession of them. But more difficulty arises where the authority of the servant is limited, *e.g.*, where he is forbidden to part with any goods before they are paid for in cash, or where he is directed to deliver certain goods to a particular person. Thus A. bought a book at a book shop, paid for it, and subsequently sent his servant to fetch it and take it to B. as a present. If X. meets the servant *en route* and obtains the book from him by pretending that he is B., this is larceny by a trick; for A. is the owner of the book, and he never intended to part with his property in it to any one except B. So the servant parted only with the possession.

In *R.* v. *Prince*[2] a married woman obtained eight £100 notes from the cashier of the London and Westminster Bank, where her husband had an account, by presenting an order purporting to be signed by him, but which was in fact a forgery; and the question was—Had the notes been stolen or only obtained by false pretences? The judgment of Blackburn, J., is very clear and forcible:—"As the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession and not with the property; if he is tricked out of the possession, the offence so committed will be larceny. . . . In the present case the cashier holds the money of the bank with a general authority from the bank to deal with it. He has authority to part with it on receiving what he believes to be a genuine order. Of the genuineness he is the judge, and if under a mistake he parts with money, he none the less intends to part with the property in it, and thus the offence is not, according to the cases, larceny, but an obtaining by false pretences."[1] The reader will also probably agree with a further remark of Blackburn, J., in this case :—"I cannot but lament that the law now stands as it does. The distinction drawn between larceny and false pretences, one being made a felony and the other a misdemeanour—and yet the same punishment attached to each—seems to me, I must confess, unmeaning and mischievous. The distinction arose in former times, and I take it that it was then held in favour of life that in larceny the taking must be against the will of the owner, larceny then being a capital offence. . . . The distinction is inscrutable to my mind, but it exists in the cases."

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[1] *Per* Buckley, L. J., in *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. at p. 479.

[2] (1868), L. R. 1 C. C. R. 150.

The indictment must state the false pretence, which operated on the mind of the prosecutor, and must state it with sufficient certainty to enable the prisoner to see clearly with what he is charged. The indictment should state to whom the false pretence was made, that it was made with intent to defraud, that the prisoner obtained the property thereby, and from whom he obtained it.[2]

On an indictment for false pretences the prisoner cannot be convicted of any other offence, except an attempt to commit that crime. If the evidence shows that the crime is really larceny by a trick and not false pretences, the prisoner is not entitled to be acquitted; he may still in a proper case be convicted of false pretences.[3]

Certain cases of false pretences have been dealt with by special statutes. Thus, by the False Personation Act, 1874,[4] it is a felony punishable by penal servitude for life to falsely personate any person, or the heir, executor or administrator, wife, widow, next of kin or relation of any person with intent fraudulently to obtain any real or personal property, whether the property be actually obtained or not. This offence is not triable at Quarter Sessions.

Personating a soldier in order to obtain his prize money, &c., is a felony punishable with penal servitude for life.[5] Personating, or procuring another to personate, a seaman in order to obtain his pay or prize money from the Admiralty is a misdemeanour punishable with penal servitude for five years.[1]

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[1] *Ib.* p. 155.

[2] See indictment, No. 10, in the Appendix.

[3] Larceny Act, 1916, s. 44 (4). For the converse case, see s. 44 (3), *ante*, p. 356.

[4] 37 & 38 Vict. c. 36, passed in consequence of the famous Tichborne case. As to personating the owner of stocks and shares, see 24 & 25 Vict. c. 98, s. 3.

[5] The Army Prize Money Act, 1832 (2 & 3 Will. IV. c. 53), s. 49.

Winning money at cards, &c., by fraud is covered by the Gaming Act, 1845,[2] and is punishable as obtaining money by false pretences.

Again, by the Merchandise Marks Act, 1887,[3] "every person, who—

(a) forges any trade mark; or

(b) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or . . .

(d) applies any false trade description to goods;[4] or . . .

(f) causes any of these things to be done,"

is guilty of an offence under this Act, unless he proves that he acted without intent to defraud. He may on conviction on indictment be sentenced to two years' imprisonment with or without hard labour, or to a fine, or to fine and imprisonment.[5]

So, too, by section 6, sub-s. 1, of the Fertilisers and Feeding Stuffs Act, 1906[6]:—"If any person, who sells any article for use as a fertiliser of the soil or as food for cattle, . . .

> (b) causes or permits any invoice or description of the article sold by him to be false in any material particular to the prejudice of the purchaser, . . .

he shall, without prejudice to any civil liability, be liable on summary conviction for a first offence to a fine not exceeding twenty pounds, and for any subsequent offence to a fine not exceeding fifty pounds."

There is another offence closely analogous to the crime of false pretences, namely, obtaining credit by false pretences or fraud. By the Debtors Act, 1869,[7] any person, who "in incurring any debt or liability has obtained credit under false pretences or by means of any other fraud," commits a misdemeanour and is liable to imprisonment with or without hard labour to the extent of one year. For example, if a man enters a restaurant, and having no money and knowing that he cannot pay for what he consumes, orders a dinner, he is guilty of obtaining credit by fraud.[1]

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[1] The Admiralty Powers, &c., Act, 1865 (28 & 29 Vict. c. 124), s. 8.

[2] 8 & 9 Vict. c. 109, s. 17; see *R.* v. *Hudson* (1860), 29 L. J. M. C. 145.

[3] 50 & 51 Vict. c. 28, s. 2 (1).

[4] As to obliterating marks or making false marks on public stores, see 38 & 39 Vict. c. 25, ss. 4, 5. As to the false marking of anchors or chain cables or false statements in certificates concerning them, see 62 & 63 Vict. c. 23, ss. 13—16.

[5] For sentences on summary conviction, see s. 2 (3) (ii.).

[6] 6 Edw. VII. c. 27; and see *Laird* v. *Dobell*, [1906] 1 K. B. 131; *Needham & Co.* v. *Worcestershire C. C.* (1909), 100 L. T. 901.

[7] 32 & 33 Vict. c. 62, s. 13 (1). See indictment, No. 24, in the Appendix.

Persons, who pretend or profess to tell fortunes or use any subtle craft, means or device, by palmistry or otherwise, to deceive or impose on any of His Majesty's subjects, are punishable under the Vagrancy Act, 1824.[2]

Cheating at Common Law.

We may here consider also the old common law misdemeanour of cheating, whereby the property of another is fraudulently obtained by some deceitful practice, which may affect the public generally; such as the use of false weights and measures, or the sale of unwholesome provisions.[3] It is punishable with fine or imprisonment (with or without hard labour) or both. The deception must, however, be one calculated to affect the public at large, and not a private individual merely: thus, making short delivery under a contract is not cheating at common law, unless false weights or measures are employed; it is simply an actionable fraud.[4]

Coinage Offences.

Originally it was high treason to counterfeit the gold and silver coin of the realm, or to import such counterfeit money into the country, knowing it to be false and with intent to utter it;[5] but by an Act passed in 1832 such offences were reduced to felony.[6] In 1861, however, the law dealing with coinage offences was consolidated,[7] and it is now felony, punishable with penal servitude for life, for any person to counterfeit any gold or silver coin of the realm.[1] To counterfeit copper coin of the realm or foreign gold or silver coin is a felony, punishable with seven years' penal servitude.[2] To counterfeit foreign coin, other than gold or silver coin, is only a misdemeanour, punishable for the first offence with imprisonment for one year, or for the second offence with penal servitude for seven years.[3]

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[1] *R.* v. *Jones*, [1898] 1 Q. B. 119, *ante*, p. 367, and see *R.* v. *Baird* (1915), 84 L. J. K. B. 1785.

[2] 5 Geo. IV. c. 83, s. 4; *ante*, p. 232.

[3] *R.* v. *Dixon* (1814), 4 Camp. 12.

[4] *R.* v. *Wheatly* (1761), 2 Burr. 1125, 1127.

[5] Treason Act, 1351 (25 Edw. III. st. 5, c. 2).

[6] 2 & 3 Will. IV. c. 34, ss. 1, 3, 6.

[7] Coinage Offences Act, 1861 (24 & 25 Vict. c. 99).

The offence is complete although the coin has not been finished, or is not in a fit state to be uttered.[4] It is not necessary to prove any intent or attempt to utter the coin; the offence consists in the counterfeiting. It is not necessary to call "any moneyer or other officer of the Mint" in order to prove the falsity of the coin; this can be done by any credible witness.[5] The counterfeiting can rarely be proved by direct evidence; it is generally made out by circumstantial evidence, such as the finding of coining tools in the house of the accused, together with pieces of the counterfeit money, some in a finished and some in an unfinished state.

To utter counterfeit gold or silver coin, knowing the same to be counterfeit, is a misdemeanour punishable with imprisonment not exceeding one year.[6] Such guilty knowledge may be proved in different ways, *e.g.*, by showing that on other occasions the prisoner tried to pass off bad money or that he had other bad money about him. If at the time of uttering he has in his possession any other counterfeit gold or silver coins, or if within the next ten days he knowingly utters another counterfeit gold or silver coin, he may be imprisoned for two years.[7] And if such uttering is after a previous conviction for uttering or for having in his possession three or more pieces of counterfeit gold or silver coin, the prisoner is guilty of felony, and can be sentenced to penal servitude for life.[8] To utter copper coin knowing it to be counterfeit, or to be in possession of three or more counterfeit copper coins with intent to utter any of them, is a misdemeanour punishable with imprisonment for one year.[1] Again, it is a misdemeanour, punishable with penal servitude for five years, to have in one's possession three or more counterfeit gold or silver coins of the realm, knowing them to be counterfeit, and intending to utter any of them.[2] But where a prisoner, convicted of this offence, has previously been convicted of uttering or of any felony relating to coin, he can be sent to penal servitude for life.[3]

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[1] Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 2.

[2] *Ib.* ss. 14, 18.

[3] *Ib.* s. 22.

[4] *Ib.* s. 30.

[5] *Ib.* s. 29.

[6] *Ib.* s. 9. See *R.* v. *Hermann* (1879), 4 Q. B. D. 284, and indictments, Nos. 30 and 31, in the Appendix.

[7] *Ib.* s. 10.

[8] *Ib.* s. 12.

There are in addition to the above many other coinage offences falling within the statute, such as colouring,[4] impairing[5] or defacing[6] coin; buying or selling,[7] importing or exporting[8] counterfeit coin without lawful authority; and making, mending, buying, selling or having in custody any coining instruments or apparatus.[9] In the latter case, which is punishable with penal servitude for life,[10] the prosecution need not prove that the prisoner had any immediate intention of using such instruments.[11] It is also specially provided that all counterfeit coin and all tools and ingredients used in making counterfeit coin shall be seized, and ultimately delivered over to the officers of the Mint—and this, whether the prisoner is acquitted or convicted.[12]

Bankruptcy Offences.

It is also necessary briefly to allude here to offences against the bankruptcy laws committed by an insolvent debtor. The main object of our bankruptcy laws is to secure that the whole of the debtor's assets should be fairly distributed amongst his creditors, and any fraudulent act of the bankrupt which tends to prevent this is severely punished. Thus, if a debtor does not fully discover and deliver up to his trustee in bankruptcy all the property available for distribution among his creditors, and all documents relating thereto, if he makes any material omission in any statement as to his affairs, if he fails—for the space of one month—to inform his trustee that a debt which he knows or believes to be false has been proved in the bankruptcy, if he prevents the production of any book or document relating to his affairs, if he makes any false representation or commits any other fraud in order to get any of his creditors to consent to any agreement as to his affairs, he commits a misdemeanour and is liable, if tried on indictment, to be imprisoned for two years, or, if he be tried summarily, for six months, with or without hard labour.[1] So is he if, within the times prescribed by section 154 of the Bankruptcy Act, 1914, he conceals or fraudulently removes any part of his property to the value of £10, or conceals, destroys, mutilates or falsifies any books or documents relating to his affairs, or attempts to account for any part of his property by fictitious losses or expenses, or fraudulently obtains goods on credit,[2] or under the false pretence of dealing in the ordinary way of his business, and does not pay for them, or pledges goods thus obtained, or disposes of them otherwise than in the ordinary course of business.[3] It is a felony, punishable with two years' imprisonment with or without hard labour, for any bankrupt, after the presentation of a bankruptcy petition by or against him or within six months before that date, to leave or attempt or prepare to leave England, taking with him any of his property to the value of £20.[4] If the jury is satisfied that the defendant had no intent to defraud, he will, of course, be entitled to be acquitted. But the burden lies upon the defendant of proving that he had no such intention.

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[1] Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 15.

[2] *Ib.* s. 11. As to copper coins see s. 15; as to foreign gold and silver coins see s. 23.

[3] *Ib.* s. 12.

[4] *Ib.* s. 3.

[5] *Ib.* s. 4.

[6] *Ib.* s. 16.

[7] *Ib.* ss. 6, 14.

[8] *Ib.* ss. 7, 8, 19.

[9] *Ib.* s. 24.

[10] Unless the instruments, &c., are designed for coining copper coins only, when the maximum punishment will be seven years' penal servitude.

[11] *R.* v. *Harvey* (1871), L. R. 1 C. C. R. 284.

[12] 24 & 25 Vict. c. 99, s. 27.

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[1] Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 154.

[2] In all cases where the credit given is £10 or more, it is an offence for an undischarged bankrupt not to inform his creditor that he is an undischarged bankrupt (s. 155 (a)). See indictments, Nos. 3 and 4, in the Appendix.

[3] S. 154.

[4] Ss. 159, 164.

Under sections 157 and 158, it is also an offence if a trader within two years of the presentation of a petition against him has gambled or engaged in rash and hazardous speculations unconnected with his trade, or has failed in certain cases to keep proper accounts.

CHAPTER IV.

RECEIVING STOLEN GOODS, &C.

AT common law any person, who knowingly "relieved, comforted or assisted" a thief by receiving from him possession of the stolen goods, became an accessory after the fact to the felony, and therefore himself a felon. There is authority, too, for saying that such a receipt with guilty knowledge was in itself a substantive misdemeanour at common law.[1]

The law on the subject is now stated thus in section 33 of the Larceny Act, 1916:—

"(1) Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable—

(a) in the case of felony, to penal servitude for any term not exceeding fourteen years;

(b) in the case of misdemeanour, to penal servitude for any term not exceeding seven years;

(c) in either case, if a male under the age of sixteen years, to be once privately whipped in addition to any punishment to which he may by law be liable.

(2) Every person, who receives any mail-bag, or any postal packet, or any chattel, or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof amounts to a felony under the Post Office Act, 1908, or this Act, knowing the same to have been so feloniously stolen, taken, embezzled or secreted, and to have been sent or to have been intended to be sent by post, shall be guilty of felony and on conviction thereof liable to the same punishment as if he had stolen, taken, embezzled or secreted the same.[2]

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[1] 1 Hale, 620.

[2] As to knowingly buying or receiving from a soldier arms, ammunition, &c., see 44 & 45 Vict. c. 58, s. 156.

(3) Every such person may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice."

Where the principal crime amounts to a felony, whether the person who committed it has or has not been tried or convicted, any person accused of receiving the goods may be tried :—

(i.) as an accessory after the fact to the principal crime ; or

(ii.) as committing a distinct felony, *viz.*, receiving.

It is usual now to insert in every indictment for larceny a second count for receiving the property knowing it to have been stolen ;[1] and the jury can find the prisoner guilty of either crime. Where the thief and the receiver are jointly charged on such an indictment, they can find one guilty of larceny and the other of receiving. Where stolen property has passed through many hands, any number of persons who have at different times knowingly received such property or any part thereof may be charged and tried together.[2] But the judge may always order a separate trial of any count or counts, if he thinks that any of the accused would be prejudiced or embarrassed by all the counts being tried together.[3]

In order to convict a prisoner of "receiving stolen goods, knowing them to have been stolen," the prosecution must prove :—

(i.) that the goods were stolen ;

(ii.) that the prisoner received the goods into his possession ; and

(iii.) that the prisoner knew at the time he so received them that they were stolen.

We take here the case of goods stolen, as it is under that form that the offence of receiving most usually occurs. The same general rules, of course, apply to the receiving of goods embezzled or obtained by fraud or threats, &c.

(i.) The original theft must be proved against the receiver just as strictly as if the thief was being tried for larceny, but by such evidence only as is admissible against the receiver. Thus anything, which the thief said behind the back of the receiver, is inadmissible against the latter. Any confession of guilt made by the thief when charged with the crime will be excluded,[4] and the jury must disregard the fact that, as sometimes happens, they have just heard the thief plead guilty to the larceny. It is, of course, open to the prosecution to call the thief as a witness on this issue—as on all others; and if under examination on the trial of the receiver he admits his guilt in the witness-box, this is some evidence to go to the jury; but if uncorroborated, it is entitled to little weight, and the judge will no doubt advise the jury to acquit the receiver.[1]

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[1] See the indictment, No. 14, in the Appendix.

[2] Larceny Act, 1916, s. 40 (3).

[3] Indictments Act, 1915, s. 5 (3).

[4] *R.* v. *Smith* (1897), 18 Cox, 470 ; and see *R.* v. *Christie*, [1914] A. C. 545.

The goods must have been dealt with in such a manner that they are technically "stolen goods" in law, when the prisoner receives them. Thus, if goods are stolen and the thief captured, and the owner of the goods then allows the thief to take them to the receiver in accordance with their previous arrangement in order to entrap him, no conviction for receiving can be sustained; for the goods, when received, were no longer "stolen goods."[2] For this reason too, difficulties often arose, when the prisoner had received from a wife goods that belonged to her husband or from a husband goods that belonged to his wife;[3] it is only in certain cases that one spouse can steal from the other.[4]

Formerly a person could not be convicted for receiving within jurisdiction goods that had been stolen abroad. But now by section 33 (4) of the Larceny Act, 1916, any person, who without lawful excuse receives or has in his possession any property stolen outside the United Kingdom, knowing it to have been stolen, is liable to penal servitude to the extent of seven years, and can be tried for that offence in any county in England in which he was apprehended or is in custody.[5]

(ii.) It must also be proved that the prisoner consciously received the goods into his actual possession. If the goods still remain in the exclusive possession of the thief, the prisoner cannot be convicted, however clear may be the evidence that he knew that they were stolen and intended to receive them.[6] There must be a change of possession. But it is not necessary that the prisoner should have manual possession of the goods; it is sufficient if they are to his knowledge in the actual possession of some one over whom he has control, and who holds them to his order.[7] Moreover, if the receiver has joint possession of the goods with the thief, he may be convicted; it is otherwise where he merely negotiates for the sale of stolen goods which are wholly in the possession of another.[1]

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[1] *R.* v. *Robinson* (1864), 4 F. & F. 43.

[2] *R.* v. *Schmidt* (1866), L. R. 1 C. C. R. 15; *R.* v. *Hancock* (1878), 14 Cox, 119; *R.* v. *Villensky*, [1892] 2 Q. B. 597.

[3] *R.* v. *Kenny* (1877), 2 Q. B. D. 307.

[4] See *ante*, pp. 345, 346.

[5] See s. 39 (1).

[6] *R.* v. *Wiley* (1850), 20 L. J. M. C. 4.

[7] *R.* v. *Smith* (1855), 24 L. J. M. C. 135.

Thus, possession of stolen goods by a servant may be possession by his master if the master knew that they were in the possession of his servant.[2]

In consequence of the rule that there must be a change of possession, it was formerly held that a wife could not be convicted for receiving from her husband goods which she knew he had stolen; for her possession was his possession. But now it is clear that a married woman can be in possession, apart from her husband, of articles of feminine attire, and of other things which are part of her separate estate.[3] Hence, if a married woman receives such goods as a gift from her husband, knowing them to have been stolen, she may be convicted. A husband, who received from his wife goods which she had stolen, could always be convicted of receiving.[4]

(iii.) Lastly, the prosecution must prove that at the time he received the goods the prisoner knew that they were stolen. If he originally received them innocently, he cannot be convicted of this offence, although he retained them in his possession after he had learnt that they were stolen.

Any facts which would have raised suspicion in the mind of a reasonable man will be evidence to go to the jury on this issue. Thus the jury may be asked to infer the guilty knowledge of the prisoner from the facts of the case proved before them, *e.g.*, that the goods were brought to him by night, that he bought them at a price much under their real value, that when charged he denied that he had them in his possession, or that he gave at different times conflicting accounts of how he came by them.

Again, the person who stole the goods can be called to prove the guilty knowledge of the receiver. Formerly, however, judges were very reluctant to allow the receiver to be convicted where the only evidence against him was that of the thief, who was an accomplice; the mere fact that the stolen property was found on the prisoner's premises was not considered sufficient corroboration of the evidence of the thief that the prisoner received the property knowing it to have been stolen.[1] But in the present day such evidence would probably be held sufficient corroboration to enable the case to be left to the jury. And if the stolen goods are found in the possession of the prisoner recently after the theft, this is a very material fact for the consideration of the jury, though it does not of itself shift the *onus* of proof and throw upon the prisoner the burden of proving that he received the goods honestly.[2] What is "recent possession" depends upon the nature of the goods in each particular case. "If the jury think that the explanation given" (by the prisoner) "may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted, inasmuch as the Crown would then have failed to discharge the burden imposed on it by our law of satisfying the jury beyond reasonable doubt of the guilt of the prisoner. The *onus* of proof is never changed in these cases; it always remains on the prosecution."[3]

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[1] *R.* v. *Watson*, [1916] 2 K. B. 385.

[2] *R.* v. *Pearson* (2) (1908), 72 J. P. 451.

[3] See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 12, 16; and *R.* v. *Payne*, [1906] 1 K. B. 97.

[4] *R.* v. *M'Athey* (1862), 32 L. J. M. C. 35.

In order to further facilitate the proof of the receiver's guilty knowledge, it has been enacted that "there may be given in evidence at any stage of the proceedings—

(a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession;[4]

(b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last-mentioned fact may not be proved unless—

(i.) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given;

(ii.) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession."[5]

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[1] *R.* v. *Robinson* (1864), 4 F. & F. 43; *R.* v. *Pratt* (1865), *ib.* 315.

[2] *R.* v. *Schama*, *R.* v. *Abramovitch* (1914), 84 L. J. K. B. 396; *R.* v. *Badash* (1918), 87 L. J. K. B. 732; *R.* v. *Sanders* (1919), 14 Cr. App. R. 11.

[3] *Per* Lord Reading, C. J., 84 L. J. K. B. at p. 398.

[4] See *R.* v. *Smith*, [1918] 2 K. B. 415.

[5] Larceny Act, 1916, s. 43 (1).

Various subsidiary statutes have from time to time been passed dealing with special classes of persons, who are often asked to receive stolen property. Thus dealers in old metal are forbidden to purchase anything before 9 a.m. or after 6 p.m. They are also prohibited from dealing with persons "apparently under the age of sixteen years."[1] Any justice of the peace has power, upon a sworn complaint that there is reason to believe that old metal unlawfully obtained is stored at a certain marine store, to authorise a search of the premises and the seizure of any such metal found therein.[2] Marine store dealers are forbidden to cut up any cable or other similar article exceeding five fathoms in length.[3]

Every pawnbroker is required yearly to take out a licence, and if a pawnbroker is convicted on indictment of receiving stolen goods knowing them to be stolen, the Court may direct that his licence shall cease to have effect.[4] He is now prohibited from dealing with "any person apparently under the age of fourteen years."[5]

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[1] The Old Metal Dealers Act, 1861 (24 & 25 Vict. c. 110), s. 8 (2); and see 8 Edw. VII. c. 67, s. 116 (1).

[2] *Ib.* s. 4.

[3] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 541.

[4] The Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), ss. 37, 38.

[5] The Children Act, 1908 (8 Edw. VII. c. 67), s. 117.

CHAPTER V.

FORGERY.

AT common law it was, and still is, a misdemeanour punishable with fine or imprisonment for two years without hard labour, or both, for any one to fraudulently make or alter any writing with the object of prejudicing another man's right, or to fraudulently utter any writing knowing that it is so made or altered. This is so whether any one be in fact prejudiced or not.[1]

Thus, it is a crime at common law to forge a railway pass,[2] a county court summons,[3] or a testimonial as to the character of an applicant for an appointment.[4] But it was held not to be forgery at common law to put the signature of a well-known artist on a picture not painted by him, for a picture is not a writing.[5] But if the picture be subsequently sold as genuine, the offender may be punished as a common law cheat, or may be indicted for obtaining money by false pretences, or, in certain circumstances, may be convicted summarily of an offence under the Fine Arts Copyright Act, 1862.[6]

Numerous statutes have been passed with regard to forgery, which prior to 1830 was a capital offence. The law on the subject was consolidated in the year 1861 by the Forgery Act,[7] and again in 1913 by the Act[8] of that year. This latter Act unfortunately leaves the common law[9] and some portions of the earlier statutes still in force,[10] which prevents it from being regarded as a perfectly satisfactory code. It commences with a definition of the crime of forgery which runs as follows: "For the purposes of this Act forgery is the making of a false document in order that it may be used as genuine, and in the case of the seals and dies mentioned in this Act the counterfeiting of a seal or die."[1]

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[1] Stephen's Digest of the Criminal Law, 6th ed., art. 403; and see *R.* v. *Nash* (1852), 21 L. J M. C. 147.

[2] *R.* v. *Boult* (1848), 2 C. & K. 604.

[3] *R.* v. *Collier* (1831), 5 C. & P. 160.

[4] *R.* v. *Sharman* (1854), 23 L. J. M. C. 51; and see *R.* v. *Toshack* (1849), 4 Cox, 38.

[5] *R.* v. *Closs* (1857), 7 Cox, 494.

[6] 25 & 26 Vict. c. 68, ss. 7, 8; and see *ante*, p. 375.

[7] 24 & 25 Vict. c. 98

[8] 3 & 4 Geo V. c 27. Throughout this chapter, where reference is made to a section without an Act being mentioned, it is a reference to the Forgery Act, 1913.

[9] S. 14 (1) (b).

[10] *E.g.*, Forgery Act, 1861, ss. 3, 5, 6, 34, 42—44, 47, to end, and parts of ss 28, 36, and 37; Forgery Act, 1870, ss. 1, 2, 4, 7, and 8

It next defines the phrase a "false document."

"A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making, or if, though made by or on behalf or on account of the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false:—

(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal or otherwise, has been made therein;

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person;

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.

For the purposes of this Act—

(a) It is immaterial in what language a document is expressed or in what place within or without the King's dominions it is expressed to take effect;

(b) Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law;

(c) The crossing on any cheque, draft on a banker, post-office money order, postal order, coupon or other document, the crossing of which is authorised or recognised by law, shall be a material part of such cheque, draft, order, coupon or document."[2]

"Forgery of the following documents, if committed with intent to defraud, shall be felony and punishable with penal servitude for life:—

(a) Any will, codicil or other testamentary document, either of a dead or of a living person, or any probate or letters of administration, whether with or without the will annexed;

(b) Any deed or bond, or any assignment at law or in equity of any deed or bond, or any attestation of the execution of any deed or bond;

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[1] S. 1 (1).

[2] S. 1 (2) and (3)

(c) Any bank note, or any indorsement on or assignment of any bank note."[1]

Section 2 (2) enumerates a large number of documents, chiefly relating to property, such as valuable securities, powers of attorney and charterparties, the forgery of which with intent to defraud is felony punishable with penal servitude for fourteen years.

Section 3 deals with official documents,[2] the forgery of which with intent to defraud or deceive is felony punishable with—

(a) penal servitude for life in the case of any document under His Majesty's seal;

(b) penal servitude for fourteen years in the case of registers or copies of registers of births, deaths and marriages, &c.;

(c) penal servitude for seven years in the case of other official documents, such as licences, certificates, &c.

"Forgery of any document which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour and punishable with imprisonment with or without hard labour for any term not exceeding two years." So is "forgery of any public document which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud or deceive."[3]

To counterfeit the various seals and dies mentioned in section 5, or the impression of any such seals,[4] with intent to defraud or deceive, is felony punishable with terms of penal servitude varying from life to seven years.

It will be observed that the Act makes an important distinction between "an intent to defraud" and "an intent to deceive." Under sections 3, 4 (2) and 5 it is sufficient if the prisoner did the act with either intention. But in the case of documents referred to in sections 2 and 4 (1) it is necessary to prove that the prisoner intended to defraud; a mere intention to deceive would not be sufficient. An intention to deceive may in some cases be innocent: not so an intention to defraud.

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[1] S 2 (1).

[2] See *ante*, p. 194.

[3] S 4.

[4] See the definition of "seal" in s. 18 (1).

Under the present law, then, it is a crime to forge any "document." But the Act of 1913 does not contain any express definition of the word "document," though most documents which are at all likely to be forged are enumerated in it.[1] The phrase "public document" is also used and not defined.[2]

It is no longer necessary that it should on the face of it purport to convey some legal consequence, or that it is good and valid for the purpose for which it was created. It is sufficient "even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law."[3]

In 1896 the case of *R.* v. *Riley*[4] evoked considerable discussion as to whether a telegram was a document which could be forged. In that case the prisoner, who was a clerk in the head post office at Manchester, heard that a horse named "Lord of Dale" had won the Newcastle Handicap. He thereupon wrote and sent to a bookmaker a telegram which purported to have been handed in at a branch post office in Manchester before the race had been run. This telegram offered a bet on the horse, which the bookmaker accepted and ultimately paid. In reality the telegram was not handed in at the branch office, but was despatched by the prisoner from the head office after the race had been run. It was held that this telegram form was an instrument within the meaning of section 38 of the Forgery Act, 1861, and that the prisoner was rightly convicted.

Merely writing down a lie is not forgery; for instance, fraudulently making a false entry in a book of account is not forgery, nor is the fraudulent imitation of a trade mark.[5] It is not enough that the document tells a lie, "it must tell a lie about itself." It need not exactly resemble the instrument it pretends to be; it is sufficient if it is capable of deceiving persons using ordinary observation according to their means of knowledge. But it is forgery either to make a false document or fraudulently to alter a genuine document in some material part.

A man can be guilty of forgery by writing even his own name. For example, where the prisoner conveyed land to A. and subsequently granted a lease of the same land to his son without the consent or knowledge of A., fraudulently dating the lease earlier than the conveyance, he was held to be guilty of forgery.[1] Again, if in signing his own name the accused, with intent to defraud, personates another man bearing the same name, his signature is a forgery.[2]

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[1] But it is still doubtful whether a picture is or is not a document within the meaning of the Act.

[2] See the definition given by Lord Blackburn, in *Sturla* v. *Freccia* (1880), 5 App. Cas. at p. 643.

[3] S. 1 (3) (b). The case of *R.* v. *Harper* (1881), 7 Q. B. D. 78, is therefore no longer law.

[4] [1896] 1 Q. B. 309.

[5] But see the provisions of the Merchandise Marks Act, referred to *ante*, p. 374

But a cheque signed *per pro.* by a person having authority so to sign cheques for specified purposes was held not to be a forgery within section 24 of the Forgery Act, 1861, although it was drawn for purposes outside and in fraud of the authority.[3]

"Where an intent to defraud or an intent to deceive is one of the constituent elements of an offence punishable under this Act," such intent must be alleged in the indictment. But it is "not necessary to allege in the indictment or to prove at the trial an intent to defraud or deceive any particular person; and it shall be sufficient to prove that the defendant did the act charged with intent to defraud or to deceive, as the case may require."[4] It is not necessary to prove that any one was in fact defrauded or deceived.

Thus, if X. forges A.'s name on a cheque so clumsily that A.'s banker suspects a forgery and refuses to honour the cheque, X. is nevertheless guilty of forgery. So, too, if Y. forges a bank note with the intention of cashing it, he has committed forgery, although it has never left his hands.

"(1) Every person who utters any forged document, seal or die shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof shall be liable to the same punishment as if he himself had forged the document, seal or die.

(2) A person utters a forged document, seal or die, who, knowing the same to be forged, and with either of the intents necessary to constitute the offence of forging the said document, seal or die, uses, offers, publishes, delivers, disposes of, tenders in payment or in exchange, exposes for sale or exchange, exchanges, tenders in evidence or puts off the said forged document, seal or die.

(3) It is immaterial where the document, seal or die was forged."[5]

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[1] *R.* v. *Ritson* (1869), L. R. 1 C. C. R. 200.

[2] *In re Cooper* (1882), 20 Ch. D. 611.

[3] *Morison* v. *London County and Westminster Bank, Ltd.*, [1914] 3 K. B. 356.

[4] S. 17 (2).

[5] S. 6. In an indictment for forgery it is usual to add a second count, charging the

Every person, who with intent to defraud demands, receives or obtains any money or other property by means of any instrument which he knows to be forged, is guilty of felony and liable to fourteen years' penal servitude.[1]

Section 8 makes it felony punishable with varying terms of penal servitude for any person without lawful authority or excuse, the proof of which shall lie on him, to have in his custody or possession, knowing the same to be forged, a forged bank note, a forged die used for the marking of gold or silver plate, a forged stamp or die as defined by the Local Stamp Act, 1869, or the Stamp Duties Management Act, 1891, or a forged wrapper or label provided by the Commissioners of Inland Revenue or of Customs and Excise.

Making or having in possession paper or implements for forgery without lawful authority or excuse, the proof of which lies on the accused, is a felony punishable with penal servitude for seven years.[2] Justices of the peace may on reasonable grounds issue a warrant directing that a search be made for such paper or implements with a view to their destruction.[3] "Possession" is defined by section 15. "Any person who knowingly and wilfully aids, abets, counsels, causes, procures or commands the commission of an offence punishable under this Act shall be liable to be dealt with, indicted, tried and punished as a principal offender."[4]

None of the offences under this Act can be tried at Quarter Sessions.[5]

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accused with knowingly uttering the forged document, so that, if the prosecution fail to prove the actual forgery, the accused may be convicted of uttering. See Indictment, No. 12, in the Appendix.

[1] S. 7; and see *R.* v. *Cade*, [1914] 2 K. B. 209.

[2] Ss. 9 and 10.

[3] S 16.

[4] S. 11.

[5] S. 13.

CHAPTER VI.

BURGLARY AND HOUSEBREAKING.

THE crime of burglary is now defined by section 25 of the Larceny Act, 1916, as follows:—

"Every person who in the night—

(1) breaks and enters the dwelling-house of another with intent to commit any felony therein; or

(2) breaks out of the dwelling-house of another, having—

(a) entered the said dwelling-house with intent to commit any felony therein; or

(b) committed any felony in the said dwelling-house;

shall be guilty of felony called burglary and on conviction thereof liable to penal servitude for life."

A Court of Quarter Sessions has jurisdiction to try any one charged with this offence, although grave and difficult cases should still be committed for trial to the Assizes.[1]

The term "dwelling-house" has a somewhat restricted meaning in the definition of burglary. It denotes a permanent building in which the occupier or any member of his family habitually sleeps at night. If the person who usually resides in the dwelling-house is temporarily absent, and nobody is sleeping there at all on the night of the burglary, it is still a dwelling-house. But the fact that a caretaker comes in at night and sleeps in a warehouse for the purpose of taking care of the goods in it will not make that warehouse a dwelling-house.[2] A part of a house may be a dwelling-house, *e.g.*, if the building be so constructed as to consist of several parts, which have no internal communication between each other, and are occupied and habitually slept in by different tenants. Thus a flat or a set of rooms in a college is a separate dwelling-house.[3] A building standing within the curtilage of a dwelling-house and occupied with it will not be deemed part of that dwelling-house "unless there is a communication between such building and dwelling-house either immediate or by means of a covered and enclosed passage leading from the one to the other."[1]

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[1] Larceny Act, 1916, s. 38.

[2] *R.* v. *Flannagan* (1810), R. & R. 187.

[3] *Fenn* v. *Grafton* (1836), 2 Bing. N. C. 617.

Such a dwelling-house, then, the burglar must have broken and entered in the night with intent to commit some felony therein. "Night" is defined[2] as the period between 9 p.m. and 6 a.m. by Greenwich mean time, but subject to the provisions of the Summer Time Act, 1916.[3] In cases of burglary at common law the breaking and entering must both take place in the night; but it is not necessary that both should take place on the same night. The breaking may occur on one night and the entry on another, provided that the breaking be with intent to enter, and the entry be with intent to commit a felony.[4]

The term "breaking" has also a technical meaning. It is not necessary that anything should be actually broken in the ordinary sense of the word. Drawing a bolt, lifting a latch, turning a key or the handle of a door which is closed, or unfastening a shutter, will be sufficient. But if the burglar enters a dwelling-house through a door or window which has been left partially open, this is not burglary, even though he opens it wider in order to effect an entrance.

Thus, if an outer door is left open, but an inner door is closed, and the burglar opens the latter, he commits burglary.[5] Obtaining access to a dwelling-house by lifting up a cellar flap, which is kept in position solely by its own weight, is a breaking;[6] so is coming down the chimney;[7] but entering through a hole in the roof which ought not to be there is not breaking. And of course it is not burglary for a thief, after he has entered without breaking a dwelling-house, to break open a chest or any movable piece of furniture within it.

Where admission into the house is obtained by means of some device or trick, there is said to be a constructive breaking on the part of the accused, as, for example, if the accused knock at the door and on its being opened rush in with a felonious intent; or gain admittance to the house on pretence of wishing to speak to some member of the household; or bribe a servant to let him into the house, in which case the servant will also be guilty of burglary as a principal in the second degree.

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[1] Larceny Act, 1916, s. 46 (2).
[2] *Ib.* s. 46 (1).
[3] 6 & 7 Geo. V. c. 14, s. 1 (3).
[4] *R.* v. *Smith* (1820), R. & R. 417.
[5] *R.* v. *Johnson* (1786), 2 East, P. C. 488.
[6] *R.* v. *Russell* (1833), 1 Moo. C. C. 377.
[7] *R.* v. *Brice* (1821), R. & R. 450.

Again, there will be a constructive breaking where the accused gains admittance by threatening to burn down the house or by other threats of violence, which put the inmates into such fear that they open the door to him.[1] So also if the accused puts a child through an open window in order that he may run round and open the door, he is guilty of a constructive breaking of the house.

Where the prisoner asked the manager of a shop with whom he was on friendly terms to hand him the keys of the shop in order that he might make duplicate keys and so obtain entrance to the premises, and the owner of the shop authorised the manager to hand over the keys in the hope of catching the prisoner, and the prisoner subsequently broke and entered the premises by means of such duplicate keys with felonious intent, he was held to be guilty of housebreaking.[2]

There will be a sufficient entering if the prisoner has inserted into the house any part of his body, or a revolver or other weapon held in his hand and used for the purpose of intimidating any person in the house. So if he inserts any instrument for the purpose of removing any goods; but it is not enough that an instrument used to break the house open or part of such an instrument has come inside the house.

Lastly, the entry must be made with the intention of committing some felony inside the dwelling-house. But the offence of burglary is complete as soon as the breaking and entering have been effected, whether the ulterior felony be committed or not. Most burglaries are planned with the object of committing larceny; but an intention to commit any felony will suffice. If the entry, however, be made with the intention of committing merely a misdemeanour or a tort, there is no burglary even if some felony be in fact committed after the accused has entered the house.

It is always a question for the jury whether the accused entered with the necessary intent. They may infer an intention to commit a felony from the fact that the prisoner after entering did commit one. But this is not conclusive. Thus, if a tramp opens the door of a dwelling-house, and enters merely to obtain shelter for the night, but afterwards yields to the temptation of stealing something which he sees inside, he is guilty only of larceny from a dwelling-house. But whatever intent is alleged in the indictment must be clearly proved, and it must be shown that the accused had this intent at the time when he broke and entered the dwelling-house.[1]

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[1] *R.* v. *Swallow* (1813), 2 Russell on Crimes, 6th ed., 8.

[2] *R.* v. *Chandler*, [1913] 1 K. B. 125

An indictment for burglary should state that the offence was committed in the night.[2] On an indictment for burglary, the jury may convict the prisoner of housebreaking, or of stealing from a dwelling-house; on an indictment for housebreaking, of stealing from a dwelling-house.

It is also a felony punishable with seven years' penal servitude to enter a dwelling-house by night with intent to commit a felony therein.[3] This provision is often useful where there is technically no breaking, *e.g.*, where a thief enters a house through an open door in search of plunder.

HOUSEBREAKING.

The offence of housebreaking is also a felony and triable at Quarter Sessions.

It may be committed in three different ways:—

(a) If a person breaks and enters at any time during the day or night any dwelling-house or any building within the curtilage of a dwelling-house and occupied therewith, or any school-house, shop, warehouse, counting-house, office, store, garage, &c., and commits a felony therein; or

(b) if a person, being in any such building, commits a felony therein and then breaks out; or

(c) if a person breaks and enters any such building with intent to commit a felony therein, although he does not actually commit it.[4]

The crime is punishable with penal servitude in cases (a) and (b) to the extent of fourteen years—in case (c) to the extent of seven years.

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[1] *R.* v. *Rodley*, [1913] 3 K. B. 468; *R.* v. *Kurasch*, [1915] 2 K. B. 749.
[2] See Indictment, No. 5, in the Appendix.
[3] Larceny Act, 1916, s. 27 (1).
[4] *Ib.* ss. 26, 27.

Housebreaking differs from burglary in two important particulars:—

(i.) It can be committed at any hour of the day or night.

(ii.) It can be committed on any building, whether a dwelling-house or not, so long as it is a solid structure, not merely a tent or movable caravan.

The rules stated above as to breaking and entering in a case of burglary apply equally to housebreaking.

It is also a misdemeanour, punishable with penal servitude for five years, to be found armed by night with intent to break into a dwelling-house or other building and commit a felony therein, or to be found in possession of housebreaking implements by night without lawful excuse, or to be disguised by night with intent to commit a felony, or to be found by night in any building with intent to commit any felony therein.[1] If the prisoner has been previously convicted of any such misdemeanour or of any felony, he may be sentenced to ten years' penal servitude.

It is sacrilege to break and enter, whether by day or night, any place of divine worship and commit a felony therein; or being in any such place of worship to commit a felony therein and then break out.[2] The offence in either case is a felony punishable with penal servitude for life, and cannot be tried at Quarter Sessions. It is also a felony punishable with penal servitude for seven years to break and enter at any time of the day or night any such place of worship with intent to commit a felony therein.[3] It is sufficient if the vestry be broken into, for the vestry is part of the place of divine worship.[4] The church, chapel or meeting-house of any denomination is "a place of divine worship" within these sections.

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[1] *Ib.* s. 28; and see *R.* v. *Ward,* [1915] 3 K. B. 696.

[2] *Ib.* s. 24.

[3] *Ib.* s. 27 (2).

[4] *R.* v. *Evans* (1842), Car. & M. 298.

CHAPTER VII.

ARSON AND OTHER MALICIOUS INJURIES TO PROPERTY.

WANTON destruction of the goods of another is severely punished by the laws of England. In such cases as a rule the prisoner derives no benefit from his act; indeed, his act is such that he cannot hope to derive benefit from it. It is not necessary for the prosecutor to prove any particular malice towards himself on the part of the prisoner; utter recklessness will be sufficient. The most usual form of malicious damage to property is known as arson—the unlawful, wilful and malicious setting fire to any building. But there are many other forms.

To wilfully and maliciously set on fire or burn or otherwise destroy any of the King's ships of war,[1] or any of the King's arsenals, magazines, dockyards, or military or naval or victualling stores, or other munition of war, is felony punishable with death.[2] Again, for any person, who is subject to the Naval Discipline Act, 1866, to unlawfully set fire to any dockyard, victualling yard, arsenal, magazine, building, stores, or to any ship, vessel or other craft, not being the property of an enemy, pirate or rebel, is felony punishable with death.[3]

To "unlawfully and maliciously set on fire, cast away or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state," is felony punishable with penal servitude for life.[4]

ARSON.

To unlawfully and maliciously set on fire any place of divine worship, any dwelling-house (any person being therein),[5] any private building with intent to injure or defraud any person, any station, engine-house, &c., belonging to any railway, port, dock, harbour, &c., or any public building, is felony punishable with penal servitude for life.[1] The same punishment can be given to any person who causes explosions which are likely to endanger life or do serious injury to property, whether or not such consequences do in fact occur.[2] To unlawfully and maliciously set fire to any other building is felony, punishable with penal servitude for fourteen years.[3]

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[1] "Whether afloat or building or begun to be built."

[2] 12 Geo. III. c. 24, s. 1; and as to the Port of London, see 39 Geo. III. c. 69, s. 104.

[3] 29 & 30 Vict. c. 109, s. 34.

[4] 24 & 25 Vict. c. 97, s. 42; and see ss. 43, 44, 46.

[5] This provision applies though the prisoner himself is the only person in the house (*R.* v. *Pardoe* (1894), 17 Cox, 715).

The act must be done unlawfully and maliciously. If the house be set on fire owing to negligence, however gross, on the part of the prisoner, the offence is not arson. But if he caused the conflagration by his recklessness, not caring whether the house was set on fire or not, an indictment will lie.

A man may be convicted of arson for setting fire to his own house. In such a case the prosecution must prove that he did so with intent to defraud somebody, *e.g.*, by showing that the house was insured. On this issue evidence is also admissible that houses previously owned and insured by the prisoner had been burnt down. If the accused wilfully set fire to his own house and the fire extend to the house of his neighbour, he is guilty of arson.[4] Again, he is guilty of arson if, intending to set fire to the house of one person, he accidentally set fire to that of another.[5] If a married woman set fire to her husband's house with intent to injure him, she could not at common law be convicted of arson. But now, by section 16 of the Married Women's Property Act, 1882,[6]—at all events in some cases—she can.

If the accused set fire to anything "in, under or against any building under such circumstances that, if the building were thereby set on fire, the offence would amount to felony," he is guilty of felony punishable with penal servitude for fourteen years.[1] But if he maliciously set fire to the goods of another in that other's house intending to injure him by burning his goods, but not intending to set fire to the house, he is not guilty of felony under this section if in fact the house does catch fire, unless the circumstances are such as to show that he knew that the probable consequence of setting fire to the goods would be that the house itself would be burnt, and was reckless whether it was or not.[2]

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[1] 24 & 25 Vict. c. 97, ss. 1—5. See the indictment No. 1, in the Appendix.

[2] 46 & 47 Vict. c. 3, s. 2; and see as to explosives generally 24 & 25 Vict. c. 97, ss. 9, 10, 45, 54, 55; as to placing in or against a letter-box or sending by post any explosive, dangerous or deleterious substance, see the Post Office Act, 1908 (8 Edw. VII. c. 48), ss. 61, 63.

[3] 24 & 25 Vict. c. 97, s. 6.

[4] *Isaac's Case* (1800), 1 East, P. C. 1030, 1031.

[5] 1 Hale, 569.

[6] 45 & 46 Vict. c. 75.

A sailor once set fire to a ship under the following circumstances. He went to the hold in order to steal rum from a cask there. Whilst the spirit was running from the cask which he had tapped, he struck a match in order to light his pipe. The flowing spirit caught fire, and the whole ship was burnt. But it was held that no conviction under section 42 (set out on p. 397) could be sustained; for although his conduct was grossly negligent, he evidently had no intention of setting fire to the ship.[3]

In *R.* v. *Harris*,[4] a workman employed in a house stole a picture by cutting it from its frame, and then set fire to the frame, hoping that it would appear that picture and frame were burnt together. The house was in fact set on fire. The jury found that the prisoner did set fire to the frame; that this caused the fire in the house; that the prisoner did fraudulently burn the frame; that he did not intend to burn the house; that he did not think it probable the house would be set on fire; that he was not reckless as to this probability. This was held to amount to a verdict of not guilty.

It is not necessary to constitute the crime of arson that there should be any visible flame.[5] But the substance of the building must be eaten into. Thus it is not arson if the substance be only externally blackened, although it may amount to an attempt to commit arson, which is a felony punishable with fourteen years' penal servitude.[6]

OTHER MALICIOUS INJURIES TO PROPERTY.

The law also punishes malicious injuries to property caused by means other than fire, or caused to property other than buildings. Thus, it is a felony punishable with penal servitude for life to destroy or injure with intent to destroy or render useless certain goods, or the tools or machinery used in manufacturing those goods.[1] The same maximum sentence may be passed on any one who damages or destroys any sea bank or wall, or any wall which retains water in a river, canal, drain or reservoir, if such damage causes any land or building to be in danger of being—*à fortiori*, if it be—overflowed or damaged by the escape of the water.[2]

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[1] 24 & 25 Vict. c. 97, s. 7.

[2] *R.* v. *Nattrass* (1882), 15 Cox, 73.

[3] *R.* v. *Faulkner* (1877), 13 Cox, 550 (Ir.).

[4] (1882) 95 C. C. C. Sess. Papers, 523.

[5] *R.* v. *Stallion* (1834), 1 Moo. C. C. 398.

[6] 24 & 25 Vict. c. 97, s. 8; and see *R.* v. *Parker* (1839), 9 C. & P. 45; *R.* v. *Russell* (1842), Car. & M. 541.

Similarly destroying any work belonging to any dock, port, harbour or reservoir,[3] destroying or rendering dangerous in the use any bridge, viaduct or aqueduct,[4] placing obstructions on a railway line,[5] masking or altering any light or signal with intent to endanger any ship,[6] setting fire to any mine of coal or other mineral fuel,[7] or riotously and with force demolishing or beginning to demolish buildings, machinery, mining plant, &c.,[8] is felony punishable with penal servitude for life.

To unlawfully and maliciously set fire to any crop of hay, grass, corn, grain or cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice or plantation, or to any heath, gorse, furze or fern, is felony punishable with penal servitude for fourteen years.[9] But to unlawfully and maliciously set fire to any stack of corn, grain, hay, straw or cultivated vegetable produce, or of furze, gorse, heath, fern, peat, &c., is a felony punishable with penal servitude for life.[10] Attempting to set fire to such crops or stacks under circumstances, which would have constituted the full offence had the attempt succeeded, is a felony punishable with penal servitude for seven years.[1] To unlawfully and maliciously kill, maim or wound any cattle, or "cut or otherwise destroy any hopbinds growing on poles in any plantation of hops," is a felony punishable with penal servitude for fourteen years.[2] So is the throwing or placing of explosives against or near any building or ship, or the destruction of any part of a stranded vessel or its cargo.[3]

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[1] 24 & 25 Vict. c. 97, s. 14. Such goods are any "article of silk, woollen, linen, cotton, hair," &c.; and the section protects all machinery used in the various processes of manufacture which apply to those goods.

[2] S. 30.

[3] S. 30.

[4] S. 33.

[5] S. 35; and see s. 36 and indictment, No. 17, in the Appendix.

[6] S. 47.

[7] S. 26; and see s. 27.

[8] S. 11. If the rioters do not do more than merely injure such buildings, they are guilty of a misdemeanour for which they can be sent to penal servitude for seven years: s. 12. But the fact that malicious damage to property is done by three or more persons acting in concert will not of itself constitute them rioters: ***Field* v. *Receiver of Metropolitan Police***, [1907] 2 K. B. 853, *ante*, p. 163.

[9] S. 16.

[10] S. 17.

It is not always easy to say how many of the series of acts which constitute the full offence must be performed by the prisoner in order that he may be convicted of an attempt. Thus, A. resolves to burn down B.'s hayrick. He procures a box of matches, goes to the rick and strikes a match. The wind at once blows it out. So far no attempt has been committed. But if, after striking a match, he carefully screens it from the wind and brings it close to the rick, when it is blown out, this will amount to an attempt to burn the rick. If the least portion of the rick be consumed, he is guilty of the full offence.

Other sections of the Malicious Injuries to Property Act, 1861, make it felony, punishable with penal servitude for seven years, to destroy or damage any machine or engine, &c.,[4] to damage a mine or delay its working by letting in water or tampering with any of the mining apparatus (*e.g.*, with any engine used for sinking or ventilating the mine, or any rope, chain or tackle belonging to such engine[5]), to remove piles used to secure a sea wall or to open the floodgates of any navigable river or canal,[6] to damage the sluices or poison the water of any fish-pond,[7] to cast adrift or alter any boat, buoy, &c., used or intended for the guidance of seamen,[8] or to damage with intent to destroy or render useless any ship, complete or incomplete, by means other than fire or explosives.[9]

The same Act makes it a misdemeanour for any one to pull down any portion of the premises of which he is a tenant,[1] to damage trees, shrubs, fruit, vegetable produce or cultivated plants,[2] to destroy any wall, fence, stile or gate,[3] to throw down any turnpike gate or toll-bar,[4] to cut, break, throw down or otherwise interfere with any telegraph wire or post,[5] to destroy or damage any public work of art,[6] or to kill or maim any animal not included under the head of "cattle."[7]

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[1] S. 18.
[2] Ss. 19, 40.
[3] Ss. 45, 49.
[4] S. 15.
[5] Ss. 28, 29.
[6] S. 31.
[7] S. 32.
[8] S. 48.
[9] S. 46.

The Act also contains a general provision. To unlawfully and maliciously commit "any damage, injury or spoil," whatever the amount, to any real or personal property, is a misdemeanour, punishable with two years' imprisonment with or without hard labour; but if the offence is committed between the hours of 9 p.m. and 6 a.m., it is punishable with five years' penal servitude.[8] At the same time, to wilfully or maliciously commit any damage to any real or personal property to an amount not exceeding £20 is an offence punishable summarily by imprisonment or fine, and the Court may also order reasonable compensation to be paid by the accused to the person aggrieved. If the justices are of opinion that the damage does not exceed £5, they should deal with the case themselves. But the fact that they have power to deal with the case summarily when the damage does not exceed £20 will not prevent them from committing the accused for trial at Quarter Sessions or Assizes, if they think fit.[9]

A somewhat strict construction has been put upon the word "maliciously," which occurs in both these sections. The prosecution must prove an intention to injure property; such an intention is sufficiently "malicious" to support the indictment.

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[1] S. 13.

[2] Ss. 22—24. But by ss. 20 and 21 it is a felony punishable with five years' penal servitude, if injury be done to any tree, shrub, &c., which exceeds the sum of £5 or when the thing injured grows in any private park, &c., the sum of £1.

[3] S. 25.

[4] S. 34.

[5] Ss. 37, 38. But see 45 & 46 Vict. c. 56, s. 22, which makes it a felony, punishable with five years' penal servitude, to cut or injure any electric line or work with intent to cut off any supply of electricity.

[6] S. 39.

[7] S. 41; and see the Acts dealing with cruelty to animals: 39 & 40 Vict. c. 77 and 1 & 2 Geo. V. c. 27.

[8] S. 51.

[9] Criminal Justice Administration Act, 1914, s. 14.

As a general rule, "a man acts maliciously, when he wilfully does that which he knows will injure another in person or property." [1] But when a statute creates a new offence unknown to the common law, it is always construed strictly.[2] The object of these sections is to prevent injury to property; and the word "maliciously" is therefore limited here to a malicious desire to injure property. An intention to injure a person will not support the indictment. Nor will it be sufficient to show that the accused intended to do an unlawful act, and that in attempting to do it he has in fact injured property.

Hence if A. flings a stone at B., misses B., but hits and breaks a street lamp, he cannot be found guilty under either of these sections, because he intended to wound a man and has only damaged the lamp by accident. If, however, he flings a stone at the lamp meaning to break it, misses the lamp and smashes a plate-glass window instead, then he can be convicted under the appropriate section: for he intended to injure property, though not the particular piece of property which he has in fact injured.[3]

This rule is, however, subject to one modification. If A. is in a room looking through a closed window and B., who is in the street, flings a stone through the window with the intention of wounding A., B. is guilty of maliciously injuring property; for he could not wound A. without breaking the intervening glass. So, if A. was in the street leaning against a plate-glass window and B. flung a stone at A.'s head, missed it and broke the window, he would in all probability be convicted of malicious injury to property, for the jury would deem him wantonly reckless; he ought to have known that his act would almost certainly break the window.

A milk-carrier who added water to his employer's milk, not with the intention of injuring him, but in order to make a profit for himself by increasing the bulk of the milk, was held guilty of the offence of damaging his employer's property.[4]

On the trial of an indictment for malicious damage to property under section 51, where the defence set up is a claim of right, the proper direction to the jury is: Did the defendant do what he did in the exercise of a supposed right? adding that if, on the facts before them, the jury come to the conclusion that the defendant did more damage than he could reasonably suppose to be necessary for the assertion or protection of that right, then the jury ought to find him guilty.

A limited company obtained a lease of certain land at Newquay, which had been until about sixty years previously a common, and over which the inhabitants exercised certain rights, such as drying their fishing nets and taking sand or rushes. When the company began to excavate foundations for an hotel and put up a wooden building as a temporary office, the inhabitants came in force and threw it down. Not content with this, they proceeded to demolish it and then dragged the pieces 120 yards and threw them into the sea. The jury found that the defendants had acted in the belief that they were asserting a right in the first place, but that by destroying the office and throwing the pieces over the cliff into the sea they did more than was necessary to be done in asserting that right; and the Court held that they were rightly convicted.[1]

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[1] *Per* Blackburn, J., in *R.* v. *Ward* (1872), L. R. 1 C. C. R. at p. 360.

[2] See *ante*, p. 75.

[3] *R.* v. *Pembliton* (1874), L. R. 2 C. C. R. 119; and see *R.* v. *Child* (1871), L. R. 1 C. C. R. 307.

[4] *Roper* v. *Knott*, [1898] 1 Q. B. 868.

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[1] *R.* v. *Clemens and others* [1898] 1 Q. B. 556.

BOOK III.—TORTS.

Chapter I.

PRIVATE RIGHTS OF ACTION.

So far we have dealt with Criminal Law—that branch of the law by which the State publishes its positive commands and prescribes the punishment to be meted out to those who disobey them. Such commands are issued and such punishments inflicted in the interests of society at large, and in order to prevent any repetition of the acts forbidden. But there is another point of view to be considered. An act, which is prejudicial to society at large, is generally also specially injurious to some particular individual, who should be compensated by the criminal for the injury done him. Again, there are many minor wrongful acts which the State regards with disfavour, but does not deem deserving of fine or imprisonment; these acts the State forbids, but not in the same direct and positive manner as that in which it forbids criminal acts. The State gives to the individual injured the right to sue for compensation, but leaves it to him to decide whether he will exercise this right or not. Such a claim for compensation is the only punishment which the law imposes for wrongful acts which are not in their nature criminal. Every wrongful act, whether criminal or not, which entitles the person injured by it to sue for compensation, is called a tort.

Civil obligations also arise when private individuals voluntarily enter into contracts. If a contract be enforceable at law and either party to it neglects or refuses to perform his part of it, the other party is entitled to compensation, which he can obtain by means of an action. A breach of contract, though in a sense wrongful, is not deemed in law a tort, although it is a tort for one man maliciously to induce another to break his contract with a third person. A tort, as a rule, is "a wrong independent of contract."[1]

This Book and the next will be devoted to the consideration of the nature and classification of torts and contracts respectively, and of the rights of action arising from them. But first we must discuss in detail the precise meaning of the legal phrase, a "right of action."

To constitute a right of action there must, as a general rule, be a "concurrence of loss and injury,"[2] or, in the technical language of lawyers, there must be both *injuria* and *damnum*. The word *injuria* denotes a wrong recognised as such by the law. The word *damnum* means "damage," not necessarily pecuniary or perceptible to others, but appreciable and capable in legal contemplation of being estimated. It follows directly from these definitions that *damnum sine injuriâ*—damage unaccompanied by legal wrong—is not actionable at law, though *injuria sine damno* often is.

Damnum sine Injuriâ.

It is not every substantial wrong, still less an imaginary grievance, which affords a right of action for redress. Nor is it true that for every kind of damage for loss occasioned by the act of another a remedy is given by the law. It not infrequently happens that damage, palpable and undeniable though it be, is without redress. Where there is a binding contract between the parties, any breach of it is in itself an *injuria* for which an action will lie without proof of damage. But when we turn to the consideration of torts, instances can readily be found of apparent injuries for which the law gives no redress although they occasion loss.

Thus no action lies for the loss inflicted on a schoolmaster by the establishment of a rival school adjacent to his own, or on a millowner by the interruption of the current of air to his mill,[1] or by the erection of a mill contiguous to his own, which causes loss of custom. So no action will lie for the loss of a view or prospect. And the owner of an ancient ferry is entitled to no compensation if a bridge be built across the river, which the public use in preference to his ferry.[2] In all these cases it has been held that there is no *injuria* or legal wrong upon which an action could be founded.

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[1] This is the phrase employed in Schedule B of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

[2] *Per* Lord Campbell, L. C., in *Lynch* v. *Knight and wife* (1861), 9 H. L. Cas. at p. 589.

The case of *Mogul S. S. Co.* v. *McGregor, Gow & Co.*[3] affords an interesting example of acts which, although they inflict damage, do not give rise to a cause of action. A combination of shipowners agreed to regulate the division of cargoes and freight from a particular port, and to allow a rebate to all shippers who shipped only with the members of the combination. The plaintiffs were thus compelled to carry at unremunerative rates; and they brought an action, alleging that the defendants had conspired to injure them. The House of Lords held that the defendants had acted with the lawful purpose of extending their trade and increasing their profits, and not with any malicious design to injure the plaintiffs; that the defendants' acts were therefore not unlawful and gave the plaintiffs no cause of action.

Again, there are many cases in which a man may, without incurring liability, so use his own property as to cause damage to his neighbour. For instance, "one landowner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus he cannot, by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger the house;[4] nor from building on his own land, although it may obstruct windows," unless he has acquired rights to support or light by lapse of time.[5] *Ā fortiori*, no action will lie, if the damage sustained by the plaintiff be the result of an "act of God" or other *vis major*.[6]

As North, C. J., remarked in *Barnardiston* v. *Soame*,[7] which was an action against the sheriff for a double return of members to serve in Parliament: "There is sometimes *damnum sine injuriâ* though the thing be done on purpose to bring a loss upon another without any design of benefit to himself: as, if a new house be erected contiguous to my grounds I may build anything on purpose to blind the lights of that new house, and no action will accrue, though the malice were never so great; much less will it lie when a man acts for his own safety."

To take an instance of a different kind, a comment upon a literary production, exposing its follies and errors and holding up the author to ridicule, will not be deemed a libel, provided it does not exceed the limits of fair and candid criticism; and a comment of this description every one has a right to publish, although the author may suffer a loss from it. In such a case, although there be *damnum*, there is no *injuria*; and even the loss is that which a party criticised ought to sustain, inasmuch as it is presumably the loss of fame and profits to which he was not fairly entitled.[1] It is otherwise if an attack be made on the character of the writer unconnected with his publication.

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[1] *Webb* v. *Bird* (1862), 13 C. B. N. S. 841; see, however, the remarks of Lord Selborne in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 798; and *Hall* v. *Lichfield Brewery Co.* (1880). 49 L. J. Ch. 655.

[2] *Hopkins* v. *G. N. Ry. Co.* (1877), 2 Q. B. D. 224.

[3] [1892] A. C. 25, affirming C. A. (1889), 23 Q. B. D. 598; and see *Allen* v. *Flood*, [1898] A. C. 1.

[4] *Hall* v. *Mayor, &c., of Bristol* (1867), L. R. 2 C. P. 322.

[5] *Per cur.* in *Smith* v. *Kenrick* (1849), 7 C. B. at p. 565.

[6] *Nichols* v. *Marsland* (1876), 2 Ex. D. 1; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743; *Box* v. *Jubb* (1879), 4 Ex. D. 76, 79.

[7] (1674), 6 St. Tr. at p. 1099.

Again, an action for seduction is in our law founded upon a fiction; the basis of this action, when brought even by a father to recover damages for the seduction of his daughter, has "been uniformly placed from the earliest times not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service" the parent "is supposed to have a legal right or interest."[2] Hence in an action for seduction, loss of service must be alleged and must be proved at the trial, or the plaintiff will fail, although the fact of seduction be clear. Unless some damage to the plaintiff can be proved or presumed, the moral turpitude of the defendant will give the plaintiff no legal right of action, though it may properly increase the amount of the verdict, once a legal cause of action is established.

Analogous to this is the case of *Ajello* v. *Worsley*,[3] where the defendant, a retail dealer in pianos, advertised for sale a new piano of the plaintiffs' manufacture at the price at which the plaintiffs supplied the same to the trade, and thereby caused other dealers to give up dealing with the plaintiffs. He continued the advertisement after he ceased to have in stock any pianos of the plaintiffs' manufacture, and after the plaintiffs had refused to supply him with any. He expected to be able to acquire pianos of the plaintiffs' from other dealers. It was held that, as the defendant honestly intended to sell the pianos at the price named, he had a legal right to issue the advertisements; and that though the advertisements amounted to an implied representation that the defendant had in his possession a piano of the advertised description, which latterly was not the case, this representation was not the cause of the damage to the plaintiffs' trade, and consequently gave no right of action.

So no action will lie against a solicitor who, being instructed to take proceedings against one person, by mistake and without malice sues, obtains judgment and issues execution against another person of the same name. In such a case it is obvious that the individual thus sued by mistake would have a good defence to the action, and would, if successful, recover in it such costs as on taxation the law allows. But he has no further remedy for the inconvenience and trouble to which he has been put, if the proceedings were adopted purely through mistake; although damage may have resulted to him, it is *damnum sine injuriâ*, for which no action would lie.[1]

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[1] See the remarks of Lord Ellenborough, C. J., in *Carr* v. *Hood* (1808), 1 Camp. 355 n.; and *McQuire* v. *Western Morning News Co.*, [1903] 2 K. B. 100; *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B. 627.

[2] *Per cur.* in *Grinnell* v. *Wells* (1844), 7 M. & Gr. at p. 1041.

[3] [1898] 1 Ch. 274.

So, again, our law gives to the owner of land all that lies beneath its surface; he may therefore dig beneath the surface at his free will and pleasure; and if, in so digging, he does an injury to his neighbour—as by draining off the water from his well—such injury cannot, in the absence of any prescriptive right, become the foundation of an action. Thus, in the case of *Chasemore* v. *Richards*,[2] the plaintiff, a landowner and millowner, had for above sixty years enjoyed the use of a stream, which was chiefly supplied by subterranean water percolating through the substrata. But the defendant, an adjoining landowner, dug on his own ground a well for the purpose of supplying water to the inhabitants of the district, and thereby diverted water which would otherwise have found its way into the plaintiff's stream. Yet the plaintiff was held to have no right of action against the defendant for thus abstracting the water, though it would have been "of sensible value in and towards the working" of the mill.

In the case of *Corporation of Bradford* v. *Pickles*,[3] the House of Lords decided that the right of the owner of land to divert or appropriate percolating water within his own land so as to deprive his neighbour of it was not affected by the fact that the act was done maliciously. So, too, no action lies against a local authority for maliciously refusing to approve of building and drainage plans submitted to them.[4]

It is difficult to apply the rule as to *damnum sine injuriâ* in cases where both the plaintiff and the defendant possess rights, which in their enjoyment encroach upon each other, and where therefore the question necessarily arises—which of these two rights is to over-ride the other? As a rule the answer to this question is that the more general right, *e.g.*, one possessed by all citizens of the State, must yield to a special or individual right, created by the particular circumstances of the case or by a special grant or vested in the holder of a particular office. Thus, every man has a right to have his reputation maintained unimpaired by any slanderous words. There are, however, occasions on which it is the right and the duty of one man to state fully and freely all that he knows about another, even though he thereby injure the reputation of that other. These are called privileged occasions; and if on a privileged occasion a man says no more than he honestly believes to be the truth, no action will lie against him.[1]

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[1] *Davies* v. *Jenkins* (1843), 11 M. & W. 745; and see *Cotterell* v. *Jones* (1851), 11 C. B. 713, approved in *Coondoo* v. *Mookerjee* (1876), 2 App. Cas. 186.

[2] (1859), 7 H. L. Cas. 349. See the judgment of Lord Penzance in *Ballacorkish Silver Mining Co.* v. *Harrison* (1873), L. R. 5 P. C. at pp. 60, 61; *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; followed in *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. 612; and *Salt Union, Ltd.* v. *Brunner Mond & Co.*, [1906] 2 K. B. 822.

[3] [1895] A. C. 587.

[4] *Davis* v. *Mayor, &c., of Bromley* (1907), 97 L. T. 705.

Again in cases such as *Acton* v. *Blundell*,[2] *Chasemore* v. *Richards*, and *Corporation of Bradford* v. *Pickles*, *suprà*, we find two great legal principles *primâ facie* in conflict: firstly, the doctrine that the absolute owner of property may deal with it as he likes, and secondly, the maxim *sic utere tuo ut alienum non laedas*, which appears to restrict the enjoyment of property to such uses as do not injure a neighbour. The general rule is "that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract."[3]

In the absence of evidence of prescription, there is at common law no liability imposed on the owner of land to maintain a wall in front of his land protecting it from the water in a creek communicating with the sea. He will not, therefore, be liable to the occupier of adjoining land for damage done to it through non-repair of the sea-wall.[4]

Every occupier of a piece of land has a *primâ facie* right "to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter; but the burden of showing that he is so bound rests on those who seek to impose an easement upon him."[5]

Yet "the Reports abound with decisions restraining a man's acts upon land with his own property, where the necessary or probable consequence of such acts is to do damage to others." Thus, in *Humphries* v. *Brogden*,[6] the surface of the land lying over the defendant's minerals belonged to the plaintiff; there was no evidence of title, or of any covenant to regulate or qualify the rights of enjoyment of the respective occupants. The jury found that the defendant had worked the mines carefully and without negligence and according to the custom of the country, but that he had not left sufficient pillars or supports for the soil above; so the only question was, whether the owner of minerals may remove them without leaving support sufficient to maintain the surface in its natural state. The Court of Queen's Bench gave judgment in favour of the plaintiff. "If A., seised in fee of land next adjoining land of B., erects a new house on his land, and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself that he built his house so near to the land of B., for he could not by his act hinder B. from making the most profitable use of B.'s own land." But, on the other hand, the Court proceeded to remark, "a man who has land next adjoining to mine cannot dig his own land so near to mine, that thereby my land shall fall into his pit;" and for so doing, if an action were brought, it seems clear, on principles of natural justice, that it would lie. The existence of such a right to lateral support for land from the adjoining soil manifestly places a restraint on the enjoyment of the adjacent property; yet, "if the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone," and great damage might be caused to its innocent owner. The law however is different where the subsidence is due to the weight of buildings on the land.[1]

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[1] See *post*, pp. 530—539.

[2] (1843) 12 M. & W. 324.

[3] *Per* Lord Blackburn in *Wilson* v. *Waddell* (1876), 2 App. Cas. at p. 99.

[4] *Hudson* v. *Tabor* (1876), 1 Q. B. D. 225; (1877), 2 Q. B. D. 290. See *West Norfolk, &c., Co.* v. *Archdale* (1886), 16 Q. B. D. 754; and *Musselburgh Real Estate Co.* v. *Provost, &c., of Musselburgh*, [1905] A. C. 491.

[5] *Per cur.* in *Humphries* v. *Cousins* (1877), 2 C. P. D. at pp. 243, 244. See *Hodgkinson* v. *Ennor* (1863), 4 B. & S. at p. 241; *Snow* v. *Whitehead* (1884), 27 Ch. D. 588.

[6] (1850), 12 Q. B. 739, 743, 744, 747 (where the previous authorities are noticed); and see *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348; *Duke of Buccleuch* v. *Wakefield* (1870), L. R. 4 H. L. 377, distinguished in *Love* v. *Bell* (1884), 9 App. Cas. 286; *Smith* v. *Darby* (1872), L. R. 7 Q. B. 716.

The owner of minerals underground has *primâ facie* a right to remove the whole of them, and a right to forbid such removal must be founded on something more than mere proximity.[2] Thus in the case of *Smith* v. *Kenrick*[3] the Court decided that it is "the natural right of each of the owners of two adjoining coal mines—neither being subject to any servitude to the other—to work his own in the manner most convenient and beneficial to himself, although the natural consequence may be, that some prejudice may accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party." But the occupier of a mine situated at a higher level than the plaintiff's mine has no right to be an active agent in sending water into the lower mine.[4]

Many Acts of Parliament authorise railway companies and other public bodies to carry out works and do other acts, which inflict loss or damage on private individuals, and which without such authority would be actionable. Such individuals cannot bring an ordinary action for damages, because there is no *injuria*, the act which has caused the damage having been legalised by statute.[5] In most cases, however, the same statute requires the railway company to pay compensation for the damage done by the works which it authorises, and directs the method by which such compensation is to be assessed—either by justices of the peace, or by arbitration. No compensation, however, can be awarded unless the act which the statute authorises would in the absence of such authority have been actionable at common law.[1]

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[1] *Hamer* v. *Knowles* (1861), 6 H. & N. 454.

[2] *Fletcher* v. *Smith* (1877), 2 App. Cas. 781.

[3] (1849), 7 C. B. 515, 564, distinguished in *Att.-Gen.* v. *Tomline* (1880), 14 Ch. D. 58.

[4] *Baird* v. *Williamson* (1863), 15 C. B. N. S. 376; *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301.

[5] *Per* Mellor, J., in *Dunn* v. *Birmingham Canal Co.* (1872), L. R. 7 Q. B. at p. 273; L. R. 8 Q. B. 42; and see *Dixon* v. *Metropolitan Board of Works* (1881), 7 Q. B. D. 418.

Again, in these cases compensation can be recovered only for damage which flows from the original construction of the works, not for damage which is caused by the subsequent management or working of the railway or other undertaking after it has been constructed. Thus, statutory compensation cannot be claimed in respect of the noise and smoke of trains which run on the railway after the line has been constructed.[2]

Injuria sine Damno.

But although *damnum sine injuria* is not actionable, *injuria sine damno* is frequently a sufficient foundation for an action. This is so whenever a legal right of the plaintiff has been violated, even though no loss or damage has been thereby occasioned. But if A. merely neglects his duty, this will as a rule give no right of action to B., unless it has caused him some loss or damage.

Thus, on proof of a breach of contract the plaintiff is as a general rule entitled to judgment, although he has proved no damage. "Where there is a breach of an express contract, nominal damages may be recovered," although no damage has really been sustained.[3]

So, whenever any proprietary right of the plaintiff has been invaded, an action lies without proof of any damage. If one of the public trespasses along a private road, he is liable to an action, though he has done no damage. The rule is the same in the case of an infringement of a copyright, patent or trade-mark.[4]

Every man has a right to have his person and his property preserved inviolate. And just as any invasion of a man's property is actionable without proof of any pecuniary loss, so is any serious disparagement of his good name. Often, too, a man's livelihood depends on his reputation. Whenever, therefore, the defendant has written and published words which injure the reputation of the plaintiff, an action will lie without proof of any pecuniary loss.

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[1] See *Ricket* v. *Metropolitan Ry. Co.* (1867), L. R. 2 H. L. 175 ; *Hammersmith, &c., Ry. Co.* v. *Brand* (1869), L. R. 4 H. L. 171 ; *McCarthy* v. *Metropolitan Board of Works* (1874), L. R. 7 H. L. 243 ; *L. B. & S. C. Ry. Co.* v. *Truman* (1885), 11 App. Cas. 45 ; *Eastern and S. A. Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A. C. 381.

[2] *City of Glasgow Union Ry. Co.* v. *Hunter* (1870), L. R. 2 H. L. (Sc.) 78.

[3] *Per* Park, J., in *Marzetti* v. *Williams* (1830), 1 B. & Ad. at p. 425 ; and see *Goodwin* v. *Cremer* (1852), 18 Q. B. 761 ; *Cook* v. *Hopewell* (1856), 11 Exch. 555.

[4] See "*Singer*" *Machine Manufacturers* v. *Wilson* (1877), 3 App. Cas. 376 ; *Johnston* v. *Orr-Ewing & Co.* (1882), 7 App. Cas. 219 ; and *post*, pp. 617, 621.

But the law is different where the words are merely spoken. Unless it is clear from the words themselves that they must have substantially injured the plaintiff's reputation, the Court requires proof of some special damage which the plaintiff has sustained as the direct consequence of the words having been uttered. Where the injury to the plaintiff's reputation is not obvious, he must prove that he has in fact sustained some appreciable damage for which compensation can be assessed. But where the words affect a man in his means of livelihood, or charge him with the commission of a crime, or impute adultery or unchastity to a woman or girl, they are said to be "actionable *per se*," though merely spoken; and no special damage need be proved.[1]

A good illustration of the application of the rule that an action will lie for *injuria sine damno* is afforded by the well-known case of *Ashby* v. *White*.[2] This was an action brought by a pauper against a returning officer for maliciously refusing to receive his vote at an election of Members of Parliament; and it was held by Lord Holt, C. J., and the House of Lords, that the action well lay, although the candidates in whose favour the vote had been tendered were in fact elected. The plaintiff had a legal right to give his vote, and an action therefore lay against the person who prevented him from exercising that right.

So an action will lie against a banker, who has sufficient funds in his hands belonging to a customer, and yet refuses to honour his cheque, even though the customer does not thereby sustain any actual loss or damage. Such an action lies in tort for the breach of duty cast by the custom of trade upon a banker: but it might also be founded upon the contract implied by law as existing between a customer and his banker that the latter will pay cheques drawn by the former, provided he has in his hands sufficient funds for that purpose. For a breach of such duty substantial damages may be awarded.[3]

Again, in *Fray* v. *Vowles*,[4] a lady sued her attorney for staying, contrary to her directions, two actions which she had brought. The defendant pleaded that in so doing he had "acted in a reasonable and careful manner, and in obedience to and in accordance with the advice, opinion and discretion of certain counsel learned in the law, then retained and employed by the plaintiff." But this was held to be no defence to the action; for "a retainer to sue, with positive directions not to compromise, makes it the duty of the attorney not to compromise; and if he does so, it is a breach of his duty," for which, whether the action be shaped in contract or tort, nominal damages at all events will be recoverable. And this, although staying the actions in all probability saved the lady trouble and expense.

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[1] See *post*, pp. 522—525.

[2] (1703), 2 Lord Raym. 938, 953; 14 St. Tr. 695; 1 Smith, L. C., 12th ed., 266; and see *Jefferys* v. *Boosey* (1854), 4 H. L. Cas. 815.

[3] *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; *Robin and another* v. *Steward, P.O.* (1854), 14 C. B. 595; *Gray* v. *Johnston* (1868), L. R. 3 H. L. 1; and see *Frost* v. *London Joint Stock Bank* (1906), 22 Times L. R. 760.

[4] (1859), 1 E. & E. 839; and see *Lovegrove* v. *White* (1871), L. R. 6 C. P. 440, and other cases cited *post*, p. 1442.

There is another important class of cases in which it is material to the preservation of a right that it should not be infringed with impunity, even in the absence of actual damage. Thus, an action will lie for an entry on the land of another, though no appreciable damage be occasioned thereby. The main reason for this is that repeated acts of such trespass might eventually be relied upon as evidence of a right to do so, and thus the plaintiff's title to the absolute enjoyment of his land might be prejudiced. Indeed, it may be stated as a general proposition that "wherever one man does a wrongful act which, if repeated, would operate in derogation of the rights of another, he is liable to an action, without particular damage, at the suit of the person whose right may be affected."[1] In such cases the plaintiff is entitled to at least nominal damages in vindication of his right.

Thus, the owners of a canal can sue any person who draws water from the canal and uses it for purposes not authorised by statute, although they have sustained no appreciable damage thereby; for the repetition of such an act might be made, in time, the foundation of a claim to a right to do it.[2]

In a subsequent case, however, where the plaintiff was the owner in fee of a cottage and the defendant of some land immediately adjoining it, the defendant erected on the plaintiff's land a hoarding on poles in order to block out the access of light to a window in the cottage. At the trial of the action it appeared that the cottage was in the occupation of a weekly tenant of the plaintiff who was not a party to the action. The Court of Appeal held that the plaintiff could not maintain an action of trespass, and that as the erection of the poles on the plaintiff's land was too trifling an injury to affect the reversion he was not entitled to an injunction.[3]

In another case the plaintiffs in common with other inhabitants of a particular district enjoyed a customary right at all times to have water from a spout situate in a highway within the district for domestic purposes. The defendant, a riparian owner on the stream which supplied the spout with water, on various occasions prevented large quantities of water from reaching the spout, and thus rendered what remained insufficient for the inhabitants entitled to use it. It was held that an action lay against the defendant for diverting the water, although the plaintiffs had not themselves suffered thereby any actual damage or inconvenience.[1]

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[1] *Per* Kelly, C. B., in *Harrop* v. *Hirst* (1868), L. R. 4 Ex. at p. 47.

[2] *The Rochdale Canal Co.* v. *King* (1849), 14 Q. B. 122, 136; and see *Singh* v. *Pattuk* (1878), 4 App. Cas. 121.

[3] *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589.

Injuria et Damnum.

Where, however, no right of the plaintiff has been violated and the defendant has merely neglected to do his duty, a different rule prevails. In such a case no one has any right of action unless the duty neglected was a duty owed to him and he has sustained some special and appreciable damage from its neglect. For instance, the breach of a public duty or the omission to do something required to be done by statute would not be actionable at the suit of any one who had sustained no damage in consequence. So, again, mere negligence, *mala fides*, fraud or misrepresentation will not give a right of action for damages unless actual damage has been thereby caused to the plaintiff. There are also many cases in which a cause of action is created by statute, but given only to those persons who have sustained particular damage.[2] In all such cases *injuria* and *damnum* must concur in order to constitute a right enforceable by action.

But there are cases in which even the combination of *injuria* and *damnum* will, for special reasons, fail to constitute a ground of action. In the first place there may have been some damage sustained, but it may be such as the law deems too remote, because it is not a sufficiently direct consequence of the illegal act complained of.[3] The defendant's act must be the proximate cause of the damage.

Thus, "it is a well-established and settled rule that the underwriter is liable for no loss which is not proximately caused by the perils insured against."[4] So, in an action of slander when the words used are not actionable *per se*, the special damage relied upon to support the action must be a legal and natural or reasonable consequence of the words spoken; thus it would not suffice to show that, by reason of them, some third person had been led to commit an assault and battery on the plaintiff.[5] And where a barman was dismissed in consequence of the defendant saying to his employer that the barman had left the premises which he occupied without paying his rent, the loss of employment was held to be too remote damage; for it was not the natural and necessary consequence of the defendant's words.[1] Again, where the defendant's servant illegally washed a van in a public street, and owing to a severe frost the waste water froze, and in consequence the plaintiff's horse slipped and broke its leg, it was held that the damage sustained was too remote a consequence of the illegal act to support an action.[2]

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[1] *Harrop* v. *Hirst* (1868), L. R. 4 Ex. 43.

[2] *Rodgers* v. *Parker* (1856), 18 C. B. 112; *Lucas* v. *Tarleton* (1858), 3 H. & N. 116; *Pickering* v. *James* (1873), L. R. 8 C. P. 489.

[3] See Remoteness of Damage, *post*, p. 1294.

[4] *Per* Martin, B., in *Rankin* v. *Potter* (1873), L. R. 6 H. L. at p. 143.

[5] *Per* Lord Ellenborough, C. J., in *Vicars* v. *Wilcocks* (1806), 8 East, at p. 4.

But where the immediate cause of the damage which the plaintiff has sustained is some act on the part of an innocent third person, the defendant will still be liable for the damage if he caused that third person so to act.

This proposition is well illustrated by the case of *Scott* v. *Shepherd*.[3] There it was held that trespass would lie against the individual who first set a squib in motion, which, after being thrown about in self-defence (and therefore lawfully) by various persons, at last put out the plaintiff's eye. The parties intervening between the plaintiff and the defendant, who acted for their own safety, could not be regarded as free agents; and consequently there was a "chain of effects," which connected the wrongdoer and the injured party and rendered the former responsible for the damage done to the latter by this tortious act.

Again, where the defendant pursued a negro boy with a view to assaulting him, and drove him into the plaintiff's shop, where damage was done by the negro to a cask of wine, it was contended that the defendant was not liable, inasmuch as the damage was occasioned, not directly by him, but by the negro boy, who, it was said, was a free agent; the Court, however, took a different view of the matter upon the old general rule that when "one does an illegal or mischievous act, which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable in some form of action for all the consequences which may directly and naturally result from his conduct." The fact that the defendant had no intention of damaging the cask of wine was regarded as immaterial. The defendant was doing an unlawful act, and was legally liable for all direct consequences of that act, although he had not contemplated them.[4]

So where the defendant had unlawfully placed a *chevaux de frise* across a public highway, and a third party had without his knowledge or consent removed it on to the footpath, it was held that the defendant was liable for injury resulting to a person lawfully using the footpath, notwithstanding the fact that the intervention of the third party was the immediate cause of the accident.[5]

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[1] *Speake* v. *Hughes*, [1904] 1 K. B. 138.

[2] *Sharp* v. *Powell* (1872), L. R. 7 C. P. 253.

[3] (1773), 2 W. Bla. 892; 1 Smith, L. C., 12th ed., 513.

[4] *Vandenburgh* v. *Truax* (1847), 4 Denio (U. S.) R. 464; and see *Guille* v. *Swan* (1822), 19 Johns. (U. S.) R. 381.

[5] *Clark* v. *Chambers* (1878), 3 Q. B. D. 327: and see *Lawrence* v. *Jenkins* (1873), L. R. 8 Q. B. 274; *Parry* v. *Smith* (1879), 4 C. P. D. 325.

Again, the law gives no private remedy for anything but a private wrong. Hence, if the defendant's wrongful act be in its nature criminal, no private person can bring an action against him for that wrongful act, unless he has suffered some special damage over and above that which the rest of the public have sustained. In the absence of such particular damage no action will lie, although there is both a wrongful act and general inconvenience resulting therefrom.

Take, for instance, the case of a public nuisance. This is an indictable offence for which, *primâ facie*, no action lies, but an indictment only, because the damage is common to all the King's subjects, and it would be extremely hard if every person in the kingdom were allowed to harass the offender with a separate action. But an action will lie, if the plaintiff's health has been injured, or if his fish have been poisoned, or if he has sustained any other special damage not shared by the rest of the public.

Accordingly, there is a "diversitie" between the mode of procedure for disturbance of a private and of a public way: in the former case, "the law doth give unto the landowner, whose right or easement is disturbed, an action for recovery of damages; but if the way be a common way and if any man be disturbed in going that way, or if a ditch be made across it so that he cannot go, yet he shall not have an action; and this the law has provided for avoiding of multiplicity of suits."[1] But if a man lawfully using a highway falls into a ditch illegally made across it and breaks his leg, he can bring an action for the particular damage which he individually has sustained.

Where the Crown, for the benefit of the public, has made a grant imposing certain public duties, and that grant has been accepted, the public may enforce the performance of those duties by indictment and individuals peculiarly injured by action.[2]

Where a duty is created for the benefit of the public by Act of Parliament, and a specific remedy is thereby provided for a breach of the duty, it must be a question of construction whether the specific remedy was intended to be substituted for or to be provided in addition to the common law remedy by indictment for the public or by action for an individual who sustains a special or particular injury.[3]

Where an Act of Parliament imposes a penalty on any one violating its provisions, but enacts that no proceeding for recovery of such penalty shall be taken by any person other than a party aggrieved without the consent in writing of the Attorney-General, a plaintiff suing without such consent will be required to show that his private interests have been affected by the act complained of, and that he has been thereby specially aggrieved, and not merely as one of the public.[1]

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[1] Sir Edward Coke, 1 Inst. 56 a.

[2] *Henley* v. *The Mayor of Lyme Regis* (1834), 2 Cl. & F. 331; and see *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, and the judgment of Bowen, L. J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. at pp. 528, 529.

[3] *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 268.

There is yet another class of cases, in which considerations of general expediency or public policy forbid our Courts to interfere or to allow any redress, although the act was tortious. Thus an action will not lie against a commanding officer for anything done by him in the course of his naval or military duty or incidental thereto;[2] so, too, the ratification by the Crown of a trespass committed by one of its officers in the public service against an alien renders it no longer actionable;[3] again, a colonial Act of indemnity may neutralise the tortious quality of an act.[4] The exemption from liability of officers carrying out Government orders rests upon this ground, that their conduct under such circumstances is an act of state, for which public policy forbids that they should be held responsible; for if "the King can do no wrong," that is, cannot be held responsible for his acts to a Court of law, neither can they who properly execute his orders or those of his Government, and their acts, if approved and ratified by the Government, become "acts of state."[5] No action will lie for any act done in the honest exercise of naval or military authority. Naval and military matters are for naval and military tribunals to determine, and not the ordinary civil Courts.[6]

Again, resting strictly on grounds of "public policy" is the non-liability of judicial officers for damage resulting from anything said or done by them in that capacity. No action will lie against a judge of a Superior Court for any acts done or words spoken in his judicial capacity, whether in court or at judge's chambers.[7] So any act done or words spoken by the judge of an Inferior Court of record in discharge of his duties and within his jurisdiction is a judicial act, and is therefore protected.[1] But he will be liable as an ordinary subject for any acts done or words spoken in any proceeding which he knew or ought to have known was outside his jurisdiction. "English judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege."[2]

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[1] *Boyce* v. *Higgins* (1853), 14 C. B. 1; *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354.

[2] *Johnstone* v. *Sutton* (1786), 1 T. R. 493, 510, 784; *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744; *Dawkins* v. *Lord Paulet* (1869), L. R. 5 Q. B. 94; *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189.

[3] *Buron* v. *Denman* (1848), 2 Exch. 167; and see *Marais* v. *General Officer Commanding*, [1902] A. C. 109; *Ex parte Mgomini* (1906), 94 L. T. 558. It is otherwise, if the trespass was committed against a British subject: *Walker* v. *Baird*, [1892] A. C. 491.

[4] *Phillips* v. *Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. 1.

[5] *Rogers* v. *Dutt*, 13 Moo. P. C. C. 209, 236.

[6] *Hart* v. *Gumpach* (1872), L. R. 4 P. C. 439; *Grant* v. *Secretary of State for India* (1877). 2 C. P. D. 445; *Heddon* v. *Evans* (1919). 35 Times L. R. 642.

[7] *Fray* v. *Blackburn* (1863), 3 B. & S. 576; *Taaffe* v. *Downes* (1812), 3 Moo. P. C. C. 36, n.; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.

It is enough if the defendant was acting as a judge; he need not prove that he was acting as a judge ought to act; questions of judicial propriety are not to be submitted to a jury. The honesty and integrity of one of our judges when acting in his judicial capacity cannot be brought in question by an action for damages, though of course, if a mistake be committed by him in point of law, his decision may be reviewed in a Court of appeal.

"The law doth so much respect the certainty of judgments and the credit and authority of judges, as it will not permit any error to be assigned that impeacheth them in their trust and office, and in wilful abuse of the same, but only in ignorance and mistaking either of the law or of the case and matter in fact."[3] "No action will lie against a judge for what he does judicially, though it should be laid *falsò malitiosè et scienter*. They who are entrusted to judge ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage."[4] Therefore, "by the law of England, if an action be brought against a judge of record for an act done by him in his judicial capacity, he may plead that he did it as a judge of record and that will be a complete justification."[5]

The reason for this exemption from liability is obvious. It is necessary to the free and impartial administration of justice that those who have been appointed to dispense it "should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege for their own protection merely; it is calculated for the benefit of the people by insuring to them a calm, steady and impartial administration of justice."[6]

Again, Lord Tenterden lays down as a general rule of very great antiquity "that no action will lie against the judge of a Court of record for any matter done by him in the exercise of his judicial functions. . . . In the imperfection of human nature it is better, even, that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct. For these, I trust, there is and always will be some due course of punishment by public prosecution."[1]

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[1] *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220.

[2] *Per cur.* in *Calder* v. *Halket* (1839), 3 Moo. P. C. C. at p. 75; and see *Houlden* v. *Smith* (1850), 14 Q. B. 841.

[3] Lord Bacon's Maxims, 17; and see *Floyd* v. *Barker* (1607), 12 Rep. 23.

[4] *Per* North, C. J., in *Barnardiston* v. *Soame* (1674), 6 St. Tr. at p. 1096.

[5] *Per* Lord Mansfield, C. J., in *Mostyn* v. *Fabrigas* (1774), 1 Smith, L. C., 12th ed. at p. 675.

[6] *Per* Fox, J., in *Taaffe* v. *Downes* (1812), reported in the note to *Calder* v. *Halket* (1839), 3 Moo. P. C. C. at pp. 51, 52.

Any arbitrator, or any person occupying the position of an arbitrator, if properly appointed, is not liable for negligence.[2] But, where an individual acts in a judicial capacity under an invalid appointment or commission, he is not exempt from civil liability. Thus certain individuals, exercising the office of judges of a colonial Court, were held liable in an action for trespass and false imprisonment, because the commissions from the governor under which they were acting were informal and void.[3]

So with the judge of a Court not of record,[4] such as a police magistrate or a justice of the peace, if he has jurisdiction in respect of the matter before him, the person charged and the place where the offence was committed, he cannot be made liable for any words spoken in the exercise of his judicial functions.[5] Thus where a magistrate, while sitting in court and in the course of his judicial duties, said with respect to a prosecutor who had just withdrawn a criminal charge, "It is our opinion that this has been a gross attempt to blackmail, and it would have been well if the matter had come before the Public Prosecutor. From what we have heard of this man [the prosecutor], he has been in the habit of trying to extort money from persons by illegal means, and if he found himself in gaol for twelve months it would possibly do him a good deal of good," it was held that such words were not actionable, even though it was alleged that they were spoken falsely and maliciously and without reasonable cause.[6]

There are still further cases in which for one reason or another our law interferes to protect parties from civil liability, *e.g.*, for a breach of contract committed by an infant, or for personal injury caused by negligence where the party injured has, by want of ordinary care, himself contributed to cause the damage of which he complains, or again where the express words or general scope of a statute bar the remedy by action.[1] But these are cases in which the circumstances afford the defendant a good defence to what was *primâ facie* a good cause of action; whereas we are at present dealing with cases in which the plaintiff has no right of action, and therefore the defendant need call no evidence in answer to it.

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[1] *Garnett* v. *Ferrand* (1827), 6 B. & C. at pp. 625, 626.

[2] *Pappa* v. *Rose* (1871), L. R. 7 C. P. 32, 525; *Tharsis Sulphur Co.* v. *Loftus* (1872), L. R. 8 C. P. 1.

[3] *Gahan* v. *Lafitte* (1841), 3 Moo. P. C. C. 382.

[4] As to which Courts are "of record" and which are "not of record," see *post*, pp. 1038—1043.

[5] *Kemp* v. *Neville* (1861), 10 C. B. N. S. 523, 547, 551.

[6] *Law* v. *Llewellyn*, [1906] 1 K. B. 487.

In the vast majority of cases, however, which are brought into Courts of justice, if both *injuria* and *damnum* be proved in support of the claim, the plaintiff has a good cause of action, and will be entitled to judgment for at least nominal damages.

In actions for breach of contract the amount of the debt, or of the damages which ought to be awarded, can as a rule be ascertained beforehand; it was either agreed by the parties at the time of the contract or it is fixed by the charges which are regular and usual in the trade or profession. Such damages are said to be liquidated. But in most actions of tort the damages are unliquidated; the amount to be recovered depends upon all the circumstances of the case and on the conduct of the parties, so that one cannot say beforehand whether the jury will award the plaintiff a farthing, forty shillings or a hundred pounds.

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[1] *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441; *Great Northern Fishing Co.* v. *Edgehill* (1883), 11 Q. B. D. 225.

CHAPTER II.

TORTS GENERALLY.

EVERY wrongful act, whether criminal or not, which entitles the person injured by it to sue for compensation, is as we have seen a tort. A breach of contract, though in a sense wrongful, is not deemed in law a tort, although it is a tort for one man knowingly and without lawful justification to induce another to break his contract with a third person. And there are a few cases in which a person who is no party to a contract may bring an action of tort to recover compensation for the negligent performance of that contract, if it was entered into with reference to himself.[1] But as a rule a tort is "a wrong independent of contract." [2]

From the above definition of a tort it follows that the same act may be both a tort and a crime. Most criminal offences against either the property or the person of a private individual are also torts. Every defamatory libel is both a tort and a crime. On the other hand, there are many crimes which are not torts, and many torts which are not crimes. To forge a cheque is a crime; but if the forgery is detected and no money is obtained by means of it, no action of tort will lie. Suicide is a crime, but not a tort. Slander, on the other hand, is a tort but not a crime. A breach of contract can very seldom be a crime.[3]

Where an act is both a tort and a crime, the person injured has a civil remedy as well as a criminal one. If the wrongful act is a misdemeanour, he may pursue his civil remedy or not when and as he thinks fit, and whether the State prosecutes the offender or not. But if the wrongful act is a felony as well as a tort, the person injured by it must wait and let the State take action first, if it wishes. He has a cause of action, but his remedy is suspended so long as the wrongdoer has not been prosecuted or a reasonable excuse shown for his not having been prosecuted. If no such excuse can be shown, any action in which damages are claimed for a felonious act will be stayed until the defendant has been prosecuted.[1]

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[1] See *post*, p. 431.

[2] Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), Schedule B.

[3] But see the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 36, and *ante*, . 106.

The civil and criminal proceedings are quite independent of each other. Whatever the person injured chooses to do—whether he sues for damages or not—the State will prosecute or not prosecute, as the interests of the community may demand. It will make no difference to the civil action whether in the criminal proceedings the defendant be acquitted or convicted, or whether he be pardoned;[2] indeed, the result of the criminal proceedings cannot be given in evidence in the civil action.[3] So on the other hand the fact that the plaintiff has abandoned his civil action or settled it out of court will in no way prevent the State from continuing the prosecution.

But no action of tort will lie unless the act which has occasioned injury to the plaintiff was a wrongful act. There must be an act of omission, which either violates the right of the plaintiff in a manner or to an extent not authorised by law, or the breach (causing damage to the plaintiff) of a duty, which the defendant owes to him. If the defendant's act be not unlawful, no action will lie, even though such act was done maliciously and has caused damage to the plaintiff. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[4]

Thus, if A. maliciously publishes of B. defamatory words which are literally true, B. cannot recover any damages, although he may in some cases take criminal proceedings for the publication of such words. If C. opens a grocer's shop next door to D.'s long-established grocery store, D. has no cause of action, unless C. was under a contract not to set up in opposition to him.

Again, it has been held that where E. made a reservoir on his own land and collected the water which ran in underground channels through his land on to that of his neighbour F., no unlawful act was committed; and therefore F. had no cause of action against E., although E. had acted maliciously and had intentionally deprived F. of the use of the percolating water.[1]

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[1] *Smith and wife* v. *Selwyn*, [1914] 3 K. B. 98; but see *Carlisle* v. *Orr*, [1918] 2 I. R. 442.

[2] There is an exception to this in the special case of assault, see *ante*, p. 324.

[3] *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414.

[4] *Per* Parke, B., in *Stevenson* v. *Newnham* (1853), 13 C. B. at p. 297, cited with approval by Lord Macnaghten in *Quinn* v. *Leathem*, [1901] A. C. at p. 508.

So, too, where traders formed an association for protecting and extending their trade and employed no unlawful means in attaining that end, it was held that no action lay against them at the suit of a trader excluded from their association who was being ruined in his endeavour to compete against them.[2] But where one trader, in order to prevent a rival trader from dealing with natives on the coast of Calabar, fired a cannon at the natives and frightened them away, it was held that this unlawful act gave rise to a good cause of action.[3]

A tort, then, is essentially a wrongful act; that is to say, it must be either some infringement of the right of another, or a neglect or breach of a legal duty. Hence in all cases of tort the right of action is founded on :—

I. The violation of some legal right vested in the plaintiff, or

II. The failure to perform some private duty owed to the plaintiff, which causes him damage, or

III. The failure to perform some public duty, which has caused to the plaintiff some special damage beyond that suffered by the public at large.

It will be necessary to examine separately each of these three classes of cases.

I.

First, then, as to those cases in which the plaintiff complains of the invasion of some legal right, *e.g.*, where wrong is done to the person or reputation, where goods are withheld from their rightful owner, or where a direct injury is done to real property. In such cases the plaintiff, in order to entitle himself to damages, must show two things—the existence of the right alleged and its violation.

The right which he claims must be vested in the plaintiff, although it is not necessary that he should be in actual enjoyment of it at the moment. The burden of proving the facts necessary to establish the existence of such right lies, of course, upon the plaintiff and often involves him in the discussion of intricate questions of law. In other cases however he can easily establish a *primâ facie* case; for whenever a man is in possession of land or chattels, the law will presume that his possession is rightful. Hence as against a wrongdoer bare possession confers a right, for the invasion of which an action will lie.[1]

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[1] *Mayor, &c., of Bradford* v. *Pickles*, [1895] A. C. 587; and see *Chasemore* v. *Richards* (1859), 7 H. L. Cas. at p. 749; *Salt Union, Ltd.* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822; and *ante*, pp. 409, 410.

[2] *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25.

[3] *Tarleton and others* v. *McGawley* (1793), 1 Peake, N. P. C. 270.

Thus, an action of trespass will lie for a mere entry upon land in possession of another. So in an action of trespass to goods the plaintiff has a good *primâ facie* case, if he can prove that the goods were in his possession and were taken out of it by the defendant. But if the owner of property has parted with possession of it to a tenant or bailee, he must show that the injury done to it by the defendant was of so permanent a nature as necessarily to injure his reversionary interest; otherwise only the person in possession can bring the action.

Once the plaintiff has established the existence of his right, he need not prove that he has availed himself of it. For instance, if a commoner sues for trespass to his common, he need not give any evidence that he has actually exercised his rights of common.[2]

In this class of cases proof of actual damage is never necessary to entitle a plaintiff to recover. As soon as he has proved the existence of the right which he claims and its violation by the defendant, he has established a *primâ facie* case, although he has sustained no pecuniary loss.[3]

Thus the plaintiff will succeed in an action to recover the possession of his goods without proving that he has suffered any pecuniary loss through being deprived of them. So in actions of libel, but not in all cases of slander, the plaintiff need not show any special damage.[4]

The use and appropriation of a registered trade mark is actionable *per se*. And it has been held in America that where the landlord of a well-known hotel had conferred on the plaintiff the right of placing the name of the hotel on omnibuses, which fetched his guests from the railway station, the defendant had no right to place the name of that hotel on his omnibuses, as this amounted to a false representation that the defendant was in the employment or under the patronage of the hotel proprietor, and that the plaintiff had a good cause of action without proof of actual damage.[5]

[1] *Armory* v. *Delamirie* (1722), 1 Str. 504; 1 Smith, L. C., 12th ed., 396.

[2] *Per* Taunton, J., in *Marzetti* v. *Williams* (1830), 1 B. & Ad. at p. 426.

[3] See *ante*, pp. 412—414.

[4] See *post*, pp. 522—525, 539—545.

[5] *Marsh* v. *Billings* (1851), 7 Cush. (U. S.) R. 322; and see *Newhall* v. *Ireson*

As soon as the plaintiff has established a *primâ facie* case, it will be for the defendant to justify his act. This he can do in some cases by showing a special right or duty in himself, which in the circumstances of the case limits the plaintiff's right or excuses the defendant's conduct. Here again difficult questions of law sometimes arise.

Thus, in *Semayne's Case*,[1] it was argued that the sheriffs of the City of London were entitled, when executing the process of the Court, to break open the outer door of the dwelling-house of a judgment debtor in violation of the well-known maxim of our law that "Every man's house is his castle." The Court, however, held that a sheriff was not entitled so to break open an outer door if the action were brought and process issued at the suit of a private person ; but that, if the process issued at the suit of the Crown, he would have the right to do so, though "before he breaks it he ought to signify the cause of his coming, and to make request to open the doors." But the sheriff, when executing process even at the suit of a private individual, may, after entry has been demanded and refused, break open the inner door of a dwelling-house or the outer door of any building which is not a dwelling-house and is in the occupation of the judgment debtor.[2]

II.

Secondly, an action of tort may be founded on the breach of some private duty owed to the plaintiff which causes him damage.

By "private duty" here is meant any obligation which the particular plaintiff, and not the community at large, has a right to enforce. The class of private duties is therefore very large, arising, as they do, from the infinite number of relationships in which one person may stand to another.

It is no good ground of objection to an action that injury of such a kind has never previously been made the subject of legal proceedings ; it is sufficient if it comes within any principle upon which the Courts act. As Pratt, C. J., observed,[3] "it is said this action was never brought before ; I wish never to hear this objection again. This action is for a tort ; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." But if it be sought to make an

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(1851), 8 Cush. (U. S.) R. 595 ; *Wotherspoon* v. *Currie* (1872), L. R. 5 H. L. 508 ; *Thompson* v. *Montgomery*, [1891] A. C. 217 ; *Reddaway* v. *Banham*, [1896] A. C. 199 ; *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135 ; *Bourne* v. *Swan & Edgar, Ltd.*, [1903] 1 Ch. 211.

[1] (1604), 5 Rep. 91 ; 1 Smith, L. C., 12th ed., 115.

[2] *Hodder* v. *Williams*, [1895] 2 Q. B. 663.

[3] *Chapman* v. *Pickersgill* (1762), 2 Wils. at p. 146.

act a tort which does not fall within any principle or rule of law, this can only be done by the interference of the Legislature.

It is not necessary in an action of tort that there should exist between the plaintiff and the defendant that special and intimate relationship which in the law of contract is known as "privity;" but the defendant must be under a duty towards the plaintiff which our law recognises and will enforce.

The general rule that "privity is not requisite to support an action of tort" was recognised and applied in the case of *Gerhard* v. *Bates*.[1] There the plaintiff claimed damages both for breach of contract and for tort; he alleged that he had been induced to put money into a company by reason of certain false statements which the defendant had wrongfully and fraudulently caused to be published in a prospectus, whereby he had incurred loss. The Court held that no action of contract would lie, as there was no privity between the parties,[2] but that he could recover in an action of tort, for which privity was not necessary, as it was "founded, irrespectively of contract, upon a false representation, fraudulently made by the defendant to the plaintiff, for the purpose of inducing the plaintiff to act upon it, the plaintiff showing that by so acting upon it he had suffered damage. Under such circumstances, although the parties be entire strangers to each other, the action lies; and it would be strange if a man who has so suffered damage from the wrongful act of another were without remedy."

Not only must the defendant be under a duty which our law will enforce, but this duty must be owed to the plaintiff, and not to a third person. A. cannot sue B. for the breach of a private duty which B. owed to C., even though A. has sustained damage in consequence of it. C. alone can sue for the breach of a duty owed to himself, and he can only sue if damage has resulted to him from that breach.

Thus, where A. employed a solicitor to draw a will for him and bade him insert a clause leaving a legacy of £1,000 to B., and the solicitor negligently omitted this clause from the will, it was held that B. had no cause of action; he had not employed the solicitor, and the solicitor therefore owed him no duty.[3]

Again, where mortgagees lent money to a builder by instalments on the strength of the certificates of a surveyor, appointed by the builder's vendor, it was held that they had no cause of action against the surveyor when they were damnified owing to such certificates being negligently drawn up; for they had not appointed the surveyor and consequently he owed no duty to them.[1]

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[1] (1853), 2 E. & B. 476, 491; and see *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377; *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34; *Weld-Blundell* v. *Stephens*, [1919] 1 K. B. 520.

[2] But see *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, and *post*, pp. 683—686.

[3] *Fish* v. *Kelly* (1864), 17 C. B. N. S. 194; *Hannaford* v. *Syms* (1898), 79 L. T. 30.

So, too, an occupier of land is under no duty towards his neighbour to periodically cut the thistles naturally growing on his land, and if, owing to his neglect to cut them, thistle seeds are blown on to his neighbour's land and there do damage, he is not liable.[2]

Where the defendant placed a horse in a field through which he knew persons were in the habit of taking a "short cut" to the railway station, he was held liable for injuries caused to one of such trespassers who was bitten by the horse, as the county court judge found that the plaintiff was in the field without express leave, but with the permission of the defendant.[3]

So where a railway company kept a turntable unlocked (and therefore dangerous to children) on their land close to a public road, and a child of four years of age was injured while playing with it, it was held by the House of Lords that there was evidence to go to a jury of actionable negligence on the part of the railway company, although the child was a trespasser, because the company's servants well knew that children were in the habit of trespassing and playing with the turntable.[4] But where there is neither "allurement, nor trap, nor invitation, nor dangerous object placed upon the land," the defendant will not be liable.[5]

In order, then, to sustain an action of this kind, the plaintiff must first establish the existence of a specific duty owed to himself, with breach of which the defendant is charged. He must, therefore, be able to prove facts from which such specific duty will in law arise. Then he must also show a breach of such duty. Lastly, he must prove some consequential damage to himself. There must be both an injury inflicted and loss resulting from that injury. The injury must be the act of the defendant, and the loss must be a direct and natural, not a remote and indirect, consequence of that act.[6] Unless loss directly results from the act, the mere intention or even an attempt to produce it will not be a cause of action. An act which does not amount to a legal injury cannot become actionable because it is done with a bad intent; thus no action lies against a man for maliciously doing his duty. And although the existence of malice is sometimes essential to the cause of action, it is no cause of action in itself, and cannot therefore be relied upon unless it is accompanied by a wrongful act and consequential loss to the plaintiff.

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[1] *Le Lièvre* v. *Gould*, [1893] 1 Q. B. 491.

[2] *Giles* v. *Walker* (1890), 24 Q. B. D. 656.

[3] *Lowery* v. *Walker*, [1911] A. C. 10.

[4] *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229.

[5] *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398.

[6] See *post*, pp. 1282 *et seq.*

A great variety of such actions may arise under the common law. Take, for instance, the numerous cases to which the maxim *Sic utere tuo ut alienum non laedas*[1] applies. Thus, in the well-known case of *Rylands* v. *Fletcher*,[2] it was held that if a man collects water in a reservoir or keeps on his own ground anything which will do injury to his neighbour if it escapes, he does so at his peril and any person injured by its escape has a good *primâ facie* cause of action. So, too, where a man makes certain alterations to the foundations of his house and in so doing removes or weakens the support which had always been afforded to the adjacent house, he will be liable if his neighbour's house is thereby injured.[3]

Other instances of liability for breach of private duty may arise out of the relation of principal and agent. Thus, the statute 30 & 31 Vict. c. 29 forbade the selling of bank shares without the name of the registered proprietor of the shares being mentioned on the bought and sold notes. But it was the custom of the Stock Exchange to disregard this enactment. Accordingly, when the plaintiff sold some bank shares, his broker omitted to state his name, as the statute required him to do. In consequence of this defect the contract was unenforceable, and the shares, which were subsequently rendered valueless by the failure of the bank, remained the property of the plaintiff. But he was held entitled to recover the price at which the shares had been sold from the broker as damages for his breach of duty.[4]

A contract may create a private duty, the breach of which will be a tort. As a general rule, where a contract exists, an action for any breach of it must be based on the contract, and will not be ground for an action of tort. The fact, however, that there is a contract existing between the parties will not prevent the plaintiff from suing in tort, if the facts be such that he could have succeeded in an action of tort without relying on the contract. But if, in order to establish any case at all against the defendant, it is necessary for him to prove that he made a contract with the defendant and that the defendant has broken it, then the plaintiff must sue in contract and not in tort. For it is the contract that defines the liability of the defendant.

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[1] "Use your own property so as not to injure that of others."

[2] (1868), L. R. 3 H. L. 330; and see *Holgate* v. *Bleazard*, [1917] 1 K. B. 443.

[3] *Bower* v. *Peate* (1876), 1 Q. B. D. 321; and see *Angus* v. *Dalton* (1878), 4 Q. B. D. 162; (1881), 6 App. Cas. 740.

[4] *Neilson* v. *James* (1882), 9 Q. B. D. 546. But, as appears from the subsequent decision in *Perry* v. *Barnett* (1885), 15 Q. B. D. 388, a plaintiff cannot recover damages under such circumstances, unless he was ignorant of the custom.

It is sometimes difficult to ascertain whether the facts of the case give rise to a cause of action founded on tort or on contract. "The distinction is this: if the cause of complaint be for an act of omission or nonfeasance which without proof of a contract to do what has been left undone would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiffs and defendants be such that a duty arises from the relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."[1]

An action by a passenger against a railway company for personal injuries caused by negligence is an action founded on tort, although he took a ticket.[2] Thus, where a railway company contracted with a master to carry himself and his servant, and in so doing was guilty of negligence whereby the servant's luggage was lost, it was held that the servant could sue in tort for the loss which he had suffered.[3] The master also could bring an action on the contract which he had made with reference to his servant and which the company had broken by not safely conveying his servant's luggage to its proper destination. Again, to take an illustration given by a learned judge[4]:—"Railway A. issues tickets for railway A. and railway B. The traffic is sometimes worked by carriages and servants belonging to railway A., and sometimes by carriages and servants belonging to railway B. A passenger takes a ticket from railway A. and gets into a carriage belonging to railway B., drawn by railway B.'s engines and manned by railway B.'s servants. The passenger traverses some portion of railway B.'s line; an accident is caused by the negligence of railway B.'s servants and through some defect in railway B.'s carriages not being properly adapted to the exigencies of the traffic. He could sue railway A. on the contract arising from the ticket issued by that company to carry him the whole distance with reasonable care and caution, or he could sue railway B. as the immediate authors of the negligence" for a breach of the duty cast on railway B. by his having been received or invited into one of their carriages and so become a passenger on their railway.

So, if an apothecary administer improper medicines to his patient, or a surgeon unskilfully treat him and thereby injure his health, the apothecary or surgeon will be liable to the patient, even where the father or friend of the patient may have made the contract and be liable for the fee; for, if no such contract had been made, the apothecary or the surgeon would still be liable to an action for negligence.[5]

Again, there are cases in which a person, who is no party to a contract, may bring an action of tort and recover damages for any fraud which induced the contract or for the negligent performance of it, provided it was entered into with express reference to himself.

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[1] *Per* Smith, L. J., in *Kelly* v. *Metropolitan Ry. Co.*, [1895] 1 Q. B. at p. 947; and see *Meux* v. *G. E. Ry. Co.*, [1895] 2 Q. B. 387.

[2] *Taylor* v. *Manchester, &c., Ry. Co.*, [1895] 1 Q. B. 134; *Kelly* v. *Metropolitan Ry. Co.*, [1895] 1 Q. B. 944.

[3] *Marshall* v. *York, Newcastle and Berwick Ry. Co.* (1851), 11 C. B. 655.

[4] *Per* Lopes, J., in *Foulkes* v. *Metropolitan District Ry. Co.* (1879), 4 C. P. D. at p. 282; and see *Hooper* v. *L. and N. W. Ry. Co.* (1881), 50 L. J. Q. B. 104; *Berringer* v. *G. E. Ry. Co.* (1879), 4 C. P. D. 163.

[5] *Gladwell* v. *Steggall* (1839), 5 Bing. N. C. 733; and see the judgment of the Court in *Longmeid* v. *Holliday* (1851), 20 L. J. Ex. at p. 432.

Thus, where the plaintiff's father purchased of the defendant a gun, stating at the time that the gun was required for the use of himself and his son, and the plaintiff was injured by the bursting of the gun, which was not of the make certified by the defendant, it was held that the plaintiff could recover damages, although he was not a party to the contract.[1] Here there was no privity whatever between the plaintiff and the defendant and no breach of any public duty, nor even a violation of any private right existing between the parties to the action. The Court, nevertheless, held that the defendant, having been guilty of deceit, was responsible for its consequences whilst the instrument sold by him was in the possession of an individual to whom his fraudulent statement had been communicated, and for whose use he knew that it was purchased. In this case fraud was distinctly alleged and proved.

But in *Longmeid* v. *Holliday*,[2] where a husband and his wife sued in tort for an injury to the wife, caused, they said, by the fraudulent and deceitful warranty of a lamp sold by the defendant to the husband, to whom therefore the warranty was made, the jury found that there was no fraud, and it was held that the wife could not properly be joined as a co-plaintiff in the action, because the injury to her flowed from the breach of contract, which was with the husband alone.

Again, where a man bought from the defendant for the use of his wife a bottle of hair-wash, which the defendant had so negligently compounded that the wife suffered injury from using it, it was held that privity was not necessary to enable the wife to sue, for the defendant had been guilty of negligence and the contract was entered into with express reference to herself.[3]

Again, the duty on which the action is based may arise from the fact that the defendant has invited the plaintiff on to his premises or that the plaintiff has lawfully entered on to such premises for some proper purpose in the way of his business. If in such a case the plaintiff is injured by reason of the defective condition of the defendant's premises, he is entitled to recover damages, unless he was aware or ought to have been aware of their defective condition before the injury occurred. If, however, the plaintiff was trespassing upon the defendant's premises, the defendant would owe him no duty.

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[1] *Langridge* v. *Levy* (1837), 2 M. & W. 519 ; 4 *Ib.* 337.

[2] (1851), 20 L. J. Ex. 430 ; and see *Winterbottom* v. *Wright* (1842), 10 M. & W. 109, followed in *Earl* v. *Lubbock*, [1905] 1 K. B. 253 ; and *Heaven* v. *Pender* (1883), 11 Q. B. D. 503.

[3] *George and wife* v. *Skivington* (1869), L. R. 5 Ex. 1 ; and see *Clarke and wife* v. *Army and Navy, &c., Society, Ltd.*, [1903] 1 K. B. 155.

Thus, if a railway company invites passengers to enter its premises, or a shopkeeper invites customers to enter his shop, they are liable should an injury happen to any one who has entered in consequence of the invitation.[1] In the case of a shopkeeper, it is a sufficient invitation to enter if goods are displayed in the window for sale and the shop door is open. So liability may arise from the mere fact that the defendant is in occupation of premises which are out of repair.[2]

A private duty may also be created by statute, although most duties so created are of a public nature.[3] "Wherever a statute gives a right to one person to have an act fulfilled by another and that other does not fulfil it, a cause of action arises."[4] So in *Richardson* v. *Willis*[5] the Court laid it down as a general rule that "where a statute gave a right to a sum of money and provided no means of recovering it, the remedy was by action."

Thus, where a railway company neglected to issue a warrant to the sheriff, as it was required to do by section 39 of the Lands Clauses Consolidation Act, 1845,[6] to summon a jury to assess the value of land which the company had given notice that it would require for the purposes of its railway, it was held that this was an actionable wrong and that a *mandamus* should be granted to compel the railway company to issue such a warrant.[7]

Again, it is provided by statute[8] that in the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment be given for the defendant, he is entitled to recover his costs from the prosecutor. But the Act provides no method for the recovery of such costs—the judge at the Assizes has no power to issue execution for them; hence the defendant's only remedy is to bring an action at law.[9]

So an action will lie against a railway company for wrongful omission of their statutory duty in regard to the transfer of shares, and for wrongfully declaring the same forfeited and selling them. For here "the defendants have been guilty of a wrongful act of omission in not registering the plaintiff's name in their books, and also of a wrongful act of commission in declaring the shares to be forfeited, and in confirming that forfeiture. It is said that the plaintiff could sustain no injury; but he has been deprived of the ordinary privileges of shareholders, and contingently of any profits that might have arisen upon the shares. These are clearly injuries, for which he has a right to bring an action."[1]

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[1] *Chapman* v. *Rothwell* (1858), E. B. & E. 168; *Hounsell* v. *Smyth* (1860), 7 C. B. N. S. 731; *Pritchard* v. *Peto*, [1917] 2 K. B. 173; *Hayward* v. *Drury Lane Theatre*, *Ib.* 899; *Kimber* v. *Gas, Light and Coke Co.*, [1918] 1 K. B. 439.

[2] *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311.

[3] See *post*, pp. 435, 436.

[4] *Per* Erle, C. J., in *Fotherby* v. *Metropolitan Ry. Co.* (1866), L. R. 2 C. P. at p. 194.

[5] (1872), L. R. 8 Ex. at p. 71.

[6] 8 Vict. c. 18.

[7] *Fotherby* v. *Metropolitan Ry. Co.* (1866), L. R. 2 C. P. 188.

[8] 8 Edw. VII. c. 15, s. 6 (2), re-enacting s. 8 of Lord Campbell's Libel Act, 1843 (6 & 7 Vict. c. 96).

[9] *Richardson* v. *Willis* (1872), L. R. 8 Ex. 69.

Further, a person who gives another dangerous goods to carry is bound to give him notice of their dangerous character, and will be liable for damages resulting from his omission to do so.[2]

III.

Lastly, an action of tort may be founded on the breach or neglect of some duty towards the public and consequent damage to the plaintiff. Here three different matters have to be proved in order to entitle the plaintiff to a verdict—the existence of the alleged duty, its breach and consequent damage to the plaintiff. The existence of a public duty either at common law or under some statute must first be established.[3] It may be a duty to do or a duty to refrain from doing acts of a particular kind. An action will lie by A. against B. whenever B. owes a duty to the public and A. suffers some special injury because B. has omitted to perform that duty, or has performed it negligently—or, in more technical language, by reason of B.'s nonfeasance or misfeasance.

Where the defendant has violated a private right of the plaintiff, proof of actual damage is not, as we have seen, necessary to entitle the plaintiff to recover. But where the defendant has neglected to perform or has carelessly performed a duty which he owes to the public generally, the plaintiff cannot recover, unless he shows that he has sustained some particular damage over and above whatever inconvenience may have been suffered by the public at large. Thus, if a man digs a trench across a public highway, no man can bring an action merely because he may have, like every one else, to go a little way out of his direct route; such public inconvenience is ground for an indictment, but not in itself for a claim to compensation. But if any one using the highway, without any negligence on his part, falls into the trench and breaks his leg, he can recover damages for the injury, which is special to himself. Again, "where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another, merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove that the doing of the act prohibited has caused him some special damage, some peculiar injury beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage;"[1] for wherever a statute creates or recognises a private right in an individual, the breach of that right gives him a title to sue without showing special damage.

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[1] *Per* Lord Campbell, C. J., in *Catchpole* v. *The Ambergate, &c., Ry. Co.* (1852), 1 E. & B. at p. 119; and see *Skinner* v. *City of London Marine Insurance Corporation* (1885), 14 Q. B. D. 882.

[2] *Brass* v. *Maitland* (1856), 6 E. & B. 470; *Mitchell, Cotts & Co.* v. *Steel Bros.*, [1916] 2 K. B. 610.

[3] As to the distinction between a public and a private duty, see *Corby* v. *Hill* (1858), 4 C. B. N. S. 556; *Indermaur* v. *Dames* (1867), L. R. 2 C. P. 311; *Great Laxey Mining Co.* v. *Clague* (1878), 4 App. Cas. 115; *Ching* v. *Surrey C.C.*, [1910] 1 K. B. 736; *Morris* v. *Carnarvon C. C.*, *Ib.* 840.

Thus, it is the duty of every one who occupies premises adjoining a public street to take care that nothing falls from his premises on to the highway, the fall of which would endanger the safety of persons passing along the street. If a barrel fell from the defendant's house on to the head of the plaintiff, the plaintiff or his personal representatives can claim compensation. But if the barrel fell at a moment when no one was passing and consequently no one was injured, no one can sue.

The plaintiff was the owner of a vessel, of which the defendant was the commander under the Admiralty, and the defendant wrongfully employed the ship in smuggling, whereby she was forfeited. It was held that the plaintiff had his remedy against the defendant for the damage he had sustained by the forfeiture and loss of the ship, occasioned by the wrongful act of the defendant.[2]

So an action of tort lies against a witness for not obeying a subpœna, if his absence has directly caused loss to the plaintiff. "In such an action brought for a breach of duty—not arising out of a contract between the plaintiff and the defendant, but for disobeying the order of a competent authority—the existence of actual damage or loss is essential to the action, as the law will not imply a loss to the plaintiff from mere disobedience to the subpœna." The object of the action is not to enforce a public duty, but to recover compensation for the injury done to the plaintiff, and the law discriminates between the breach of the public duty and the personal damage; whereas only the former will be considered on a motion for attachment for the contempt of Court committed by the witness. "To found a motion for an attachment against a witness for disobeying a subpœna, it must be shown that he has wilfully abstained from attending in pursuance thereof, or that he has in some way treated the process of the Court with contempt." Even if the subpœnaed witness should succeed on the question of contempt, he will still be liable to an action for any damage which the plaintiff may have sustained in consequence of his non-attendance, the ground of such an action being the breach of public duty by the witness in disobeying the process of the Court combined with the special damage which such non-attendance has caused to the plaintiff.[1]

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[1] *Per cur.* in *Chamberlaine* v. *Chester and Birkenhead Ry. Co.* (1848), 1 Exch. at pp. 876, 877.

[2] *Blewitt* v. *Hill* (1810), 13 East, 13.

A public duty is often expressly created by statute; when this is so, the precise nature and extent of the duty must be determined by the language of the Act creating it. "When a statute gives a right, then, although in express terms it has not given a remedy, the remedy which by law is properly applicable to that right follows as an incident."[2]

A statutory duty towards the public may consist either in doing or abstaining from doing some particular act. And "if the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures;"[3] but the non-performance of a legal obligation of this kind will not be actionable without special damage. Again, "when a ministerial duty is imposed, an action lies for breach of it without malice or negligence;"[4] "where any law requires one to do any act for the benefit of another, or to forbear the doing of that which may be to the injury of another, though no action be given in express terms by the law for the omission or commission, the general rule of law in all such cases is that the party so injured shall have an action."[5]

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[1] *Couling* v. *Coxe* (1848), 6 C. B. 703, 718, 719.

[2] *Per* Maule, B. (quoting Lord Holt, C. J.), in *Braithwaite* v. *Skinner* (1839), 5 M. & W. at p. 327.

[3] *Per* Lord Brougham in *Ferguson* v. *Earl of Kinnoull* (1842), 9 Cl. & F. at p. 289.

[4] *Per* Bovill, C. J., in *Pickering* v. *James* (1873), L. R. 8 C. P. at p. 503.

[5] *Per* Lord Holt, C. J., in *Ashby* v. *White* (1703), (ed. 1837) p. 11; for other reports of his judgment see 2 Lord Raymond, 950, and 1 Smith's L. C., 12th ed., 281.

Thus, where a railway company was bound by statute to keep closed (except on necessary occasions) the gates leading from an adjoining highway on to the railway, so as to prevent cattle or horses passing along the road from straying on to the line, and the company failed in this duty, it was held liable for damage done to certain horses which had strayed from the highway on to the railway and were killed.[1]

Again, by the Factory Acts a duty to fence all dangerous machinery is cast upon every factory owner, and an action of tort lies against him if one of his employees is injured through any neglect to fence.[2] But he will have to prove that at the time of the accident the machinery was in motion for some "manufacturing process ;" otherwise the Factory Acts will not apply.[3]

But the right to sue for the breach of a public statutory duty is subject to two important qualifications :—

(a) "An action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute ;"[4] for no such right of action existed before the statute was passed, and the statute prescribes a remedy to which the newly created right of action will be restricted. "Where an Act creates an obligation and enforces the performance in a specified manner," it generally holds true "that performance cannot be enforced in any other manner."[5]

No action lies against a sanitary authority for neglecting to remove snow from the streets in accordance with section 29 of the Public Health Act, 1891,[6] and this though the plaintiff has suffered actual damage, because the statute provides that for such neglect "the sanitary authority shall be liable to a fine not exceeding twenty pounds."[7]

(b) Where, moreover, a statutory duty is created with the object of preventing a mischief of a particular kind and a person, by reason of the neglect of such duty by another, suffers a loss of a different kind, he is not entitled to maintain an action in respect of such loss.

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[1] *Fawcett* v. *The York and North Midland Ry. Co.* (1851), 16 Q. B. 610 ; and see *Matson* v. *Baird* (1878), 3 App. Cas. 1082.

[2] *Groves* v. *Lord Wimborne,* [1898] 2 Q. B. 402 ; and see *Britton* v. *Great Western Cotton Co.* (1872), L. R. 7 Ex. 130, and 1 Edw. VII. c. 22, s. 10.

[3] *Coe* v. *Platt* (1852), 7 Exch. 923.

[4] *Per cur.* in *Stevens* v. *Jeacocke* (1848), 11 Q. B. at p. 741 ; and see *Manchester, &c., Ry. Co.* v. *Denaby Main Colliery Co.* (1885), 11 App. Cas. 97 ; *Rhymney Ry. Co.* v. *Rhymney Iron Co.* (1890), 25 Q. B. D. 146.

[5] *Per cur.* in *Doe* d. *Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. at p. 859.

[6] 54 & 55 Vict. c. 76.

[7] *Saunders* v. *Holborn District Board of Works,* [1895] 1 Q. B. 64 ; and see *Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441.

Thus, where the defendant had neglected to follow an order of the Privy Council (made under the authority of the Contagious Diseases (Animals) Act, 1869 [1]), and in consequence the plaintiff's sheep were washed overboard, it was held that the plaintiff could not recover damages for his loss, as it was not loss of the kind contemplated by the statute. [2]

To sum up, then. No act which the law authorises is a tort; and a breach of contract is not a tort. But every other act or omission which infringes the right of another, or is a breach of a duty owed to that other which has caused that other damage, or is a breach of a duty owed to the public which has caused some one damage over and above that suffered by the rest of the public, is a tort.

A right of action for a tort may be discharged in many ways. As a general rule at common law the death of either the wrong-doer or the person wronged put an end to the action, if final judgment had not been already signed.[3] But power to sue for a wrong done to a dead man has in certain cases been given to his legal personal representative by various statutes.[4] There are also a few instances in which an action can be brought against the estate of a dead man for a wrong committed by him in his lifetime.[5]

A right of action for unliquidated damages for a tort is not, as a rule, affected by the bankruptcy of either the wrong-doer or the person wronged. A right of action for a personal wrong, such as seduction, libel, slander, personal injuries, &c., will not pass to the plaintiff's trustee in bankruptcy; [6] but where the tort in question has caused actual loss to the plaintiff's estate, the right of action does pass to the plaintiff's trustee.[7] A claim for unliquidated damages cannot be proved in the bankruptcy of the defendant,[8] and, therefore, his discharge in bankruptcy will not release him from such a claim.

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[1] 32 & 33 Vict. c. 96.

[2] *Gorris* v. *Scott* (1874), L. R. 9 Ex. 125, 130.

[3] *Twycross* v. *Grant* (1878), 4 C. P. D. 40, 45.

[4] 4 Edw. III. c. 7; 25 Edw. III. st. 5, c. 5; 3 & 4 Will. IV. c. 42, s. 2; 9 & 10 Vict. c. 93, s. 1; 27 & 28 Vict. c. 95, s. 1; 43 & 44 Vict. c. 42, s. 1; 6 Edw. VII. c. 58, s. 13.

[5] *Peek* v. *Gurney and others* (1873), L. R. 6 H. L. 377; *In re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387; and see *post*, Book VI., Executors and Administrators.

[6] *Ex parte Vine* (1878), 8 Ch. D. 364; *Rose* v. *Buckett*, [1901] 2 K. B. 449.

[7] See *Hodgson* v. *Sidney* (1866), L. R. 1 Ex. 313.

[8] 46 & 47 Vict. c. 52, s. 37.

But if a judgment has been actually obtained in an action of tort, the claim ceases, of course, to be unliquidated, and the judgment debt must be proved in the defendant's bankruptcy.

The marriage of a female defendant affords no defence to an action brought against her for a tort committed either before or after her marriage. She can in both cases be sued as a *feme sole.* In the case of a tort committed by her before the marriage, her husband is liable to the extent only of any property he may have received from her on the marriage.[1] In the case of any tort committed by her after the marriage, the unfortunate husband is liable to the full extent and has no right of action over against her separate estate to recoup himself.[2] She can, of course, sue by herself or with her husband for a wrong done to her before or after marriage.

A right of action for a tort may also be waived, either expressly or by the conduct of the parties; it may also be discharged by an accord and satisfaction or a release by a deed under seal.[3] A judgment against one of two or more joint tortfeasors operates as a release to the other or others.[4] In a few cases tender of amends has been made by statute a defence to an action of tort.[5]

Lastly, a right of action for a tort may be barred by the operation of the Statutes of Limitation. Different periods are assigned by different statutes. An action against any one for an act done in pursuance of, or for any neglect of duty under, any Act of Parliament or any public duty or authority must be brought within six months of the date of the act or omission complained of.[6] An action of slander for words actionable *per se* must be brought "within two years next after the words spoken."[7] Whenever the words are actionable only by reason of special damage, the time does not begin to run till the damage has actually been sustained;[1] and then the plaintiff has six years within which to sue, and not merely two. But in the case of any trespass to the person, the plaintiff is allowed four years in which to bring his action.[2] In all other cases the period of limitation is six years, and the time begins to run from the date when the cause of action first accrued, unless the plaintiff be then an infant or a lunatic, or the defendant be beyond the seas, when the time begins to run from the date of the infant coming of age, or of the lunatic becoming of sane memory, or of the defendant returning from beyond the seas.[3] But if once such disability be removed and the time begin to run, nothing afterwards can stop it.

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[1] 45 & 46 Vict. c. 75, ss. 13—15.

[2] *Ib.* s. 1; and see *Seroka and wife* v. *Kattenburg and wife* (1886), 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 1 Ch. 203.

[3] See *Jones* v. *Broadhurst* (1850), 9 C. B. 173; *Steeds* v. *Steeds* (1889), 22 Q. B. D. 537; and *post*, pp. 763, 764.

[4] *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547.

[5] See the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (c).

[6] *Ib.* s. 1 (a).

[7] Limitation Act, 1623 (21 Jac. I c. 16), s. 3.

Statutes of Limitation, however, do not as a rule destroy the right, but only bar the remedy; their operation, therefore, is properly discussed under the head of procedure.[4]

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[1] *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

[2] 21 Jac. I. c. 16, s. 3 (3).

[3] *Ib.* s. 7; 4 & 5 Anne, c. 3 (al. c. 16), s. 19; 3 & 4 Will. IV. c. 42, s. 7; 19 & 20 Vict. c. 97, ss. 10, 12.

[4] See *post*, pp. 1133—1143.

Chapter III.

RECOVERY OF LAND.

Before the Judicature Act, 1873, actions at law were divided into three classes—real, personal and mixed. In real actions, questions of title to land were decided; in mixed actions, claims to possession of land; and in personal actions, claims for debt or damages. In 1873 the only mixed action surviving was the action of ejectment. The Judicature Act created the action for the recovery of land, which practically takes the place of both the former real and mixed actions. If the plaintiff succeeds in such an action, a writ will issue to the sheriff, bidding him enter on the land and without delay "cause the plaintiff to have possession of the said land and premises with the appurtenances." But although this action is in form brought only to recover possession of land, yet in it questions of title are frequently decided; and in such an action the plaintiff can apply to the Court for a declaration that he is entitled to the land in question.[1] But where the action is brought by a landlord against his tenant, no question of title can arise, as a tenant is estopped from denying his landlord's title.[2]

The plaintiff in an action for the recovery of land is always a person who is out of possession, but who claims to have a right to the immediate possession of the land. If he desires to recover the whole of the premises mentioned on his writ, he should join as a defendant every person who is in possession of any part of them. He will be *primâ facie* entitled to a verdict on proof that the land is his; for the ownership of land involves a right to the possession of it, unless the owner has voluntarily parted with possession to some third person. If the defendant asserts that he is in possession of the land by the permission of the plaintiff, he thereby admits that the plaintiff had the right so to place him in possession. In other words, he admits the plaintiff's title at that date, though he may contend that it has since determined, as, for instance, if the lessor himself had only a leasehold interest.[1]

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[1] *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492; and see Declaration of Title, *post*, p. 1161.

[2] See *post*, p. 1265.

Where, however, there is no suggestion that the defendant received possession from the plaintiff or has paid him rent, the *onus* lies on the plaintiff of strictly proving his title, and he must state his title in full detail in his pleading.[2] On the other hand, the defendant is allowed to state merely that he is in possession, and thus to conceal all defects in his title.[3] There are also many other differences between the procedure in an ordinary action and that in an action for the recovery of land; these are discussed in a later chapter.[4]

The plaintiff in such an action must recover by "the strength of his own title, and not by the weakness of the defendant's" title;[5] for the law deems any one who is in possession of land to be the owner of it until the contrary be proved.[6] Hence, where the relation of landlord and tenant does not exist between the parties, the plaintiff must show in himself a good and sufficient legal title to the land claimed; he must show that he is either the freeholder or a person claiming under the freeholder. But if he claims as heir-at-law of A., it will be sufficient for him to prove that A. was in possession and that he is A.'s heir; the law will presume that A. was seised in fee, until the contrary appear. If the defendant can show that some third person has a better title than the plaintiff, this will be a sufficient defence, although such third person has never agreed or consented to the defendant's being in possession. "The plaintiff must exhaust the possibility that there are other heirs, and give some negative evidence to show that there are no descendants entitled in preference to himself."[1] But this rule will not be rigidly enforced in cases where the plaintiff's claim dates back beyond living memory, and he has done all he could by advertisement, &c., to discover other descendants who have a better title than himself, and has failed to do so.

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[1] *Barwick* v. *Thompson* (1798), 7 T. R. 488; *Cuthbertson* v. *Irving* (1859), 4 H. & N. 742; (1860), 6 *Ib.* 135; *Delaney* v. *Fox* (1857), 2 C. B. N. S. 768. Where the privity is not between the immediate parties to the action, the claimant will also have to prove his derivative title from the party by whom the defendant was originally admitted into possession. See Odgers on Pleading and Practice, 8th ed., pp. 128—138.

[2] *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127, followed in *Davis* v. *James* (1884), 26 Ch. D. 778; but see *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554.

[3] Unless he relies on some equitable defence, in which case he must plead it specially: Order XXI., r. 21.

[4] Book V., Chap. XIX., *post*, p. 1254.

[5] *Per* Lee, C. J., in *Martin* v. *Strachan* (1743), 5 T. R. at p. 110, n.

[6] *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1.

Yet a judgment in an action for the recovery of land will not give the plaintiff an indefeasible title good against all the world, but only a title good at date of writ against those defendants who were served with it.[2] It will still be open to some third person to prove that the successful plaintiff has only a life estate or a leasehold interest in the property recovered, or even no estate or interest whatever, in which last case he will be bound to account to the true owner for the profits of the land. And even between the same parties a judgment in an action for recovery of land cannot be deemed conclusive evidence of title in the successful plaintiff at any later date; for a person may have a title to the possession of land at one time and not at another. Should the unsuccessful defendant, or any other person, subsequently become clothed with a better title than the plaintiff, a second action may be brought and the plaintiff may be ejected from the land. The judgment in the first trial would, however, between the same parties, be strong evidence on behalf of the party who then obtained the verdict.

But when the relation of landlord and tenant exists between the parties, the plaintiff, as we have seen, need not prove his title. He must first establish that the defendant accepted possession of the land from himself or some predecessor in title, and that the defendant has continued in possession as tenant to himself; the simplest proof of this fact is that the defendant has paid him rent. Next, the plaintiff must show the terms on which the defendant entered; this is usually done by producing and proving the lease. Lastly, the plaintiff must show that under the terms of the tenancy he is now entitled to call upon the defendant to surrender possession of the premises. In other words, he must show that the term of years for which the lease was granted has now expired by effluxion of time; or if the tenancy was from year to year only, that it has been duly determined by a notice to quit; or, thirdly, that the lease contains a proviso for re-entry in case the tenant breaks any covenant in it by him to be performed, and that the defendant has broken such a covenant and thereby forfeited his lease.

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[1] *Per* Bramwell, B., in *Greaves* v. *Greenwood* (1877), 2 Ex. D. at p. 291.
[2] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 70.

The Conveyancing Acts of 1881 and 1892,[1] however, contain provisions strongly in favour of a tenant in whose lease there is such a proviso for re-entry. No landlord can bring an action to enforce a forfeiture and re-enter on the premises unless, a reasonable time before commencing the action, he serves on his tenant a notice setting out the particular breach complained of, and requiring him to put it right and pay a sum of money as compensation.[2] But no such notice is necessary where the ground of forfeiture is:—

(i.) Non-payment of rent.
(ii.) Breach of a covenant against assigning, sub-letting or parting with the possession of the demised property.
(iii.) Breach of a covenant in a mining lease which allows the lessor to inspect property or books and accounts.
(iv.) Bankruptcy of the lessee, or the taking in execution of the lessee's interest, unless the action be commenced within one year from the date of the bankruptcy or of the taking in execution.[3]

In these cases, therefore, the landlord is not bound to give any such notice; in all other cases he must.

If, however, a landlord seeks to eject his tenant for non-payment of rent, he will experience some difficulty unless the proviso for re-entry in his lease contains the words "whether the same shall have been demanded or not." If it does, he has merely to prove that the defendant had not paid his rent. But if it does not, then he must go further and adopt one or other of the following courses:—

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[1] 44 & 45 Vict. c. 41, s. 14; 55 & 56 Vict. c. 13, s. 2.
[2] See *Fox* v. *Jolly*, [1916] A. C. 1.
[3] See *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B. 79, 91; *Fryer* v. *Ewart*, [1902] A. C. 187.

(a) He must either prove what is called "a common law demand" of the rent on the premises—a feat which, it is credibly asserted, no plaintiff ever succeeded in accomplishing; or

(b) under the provisions of the Common Law Procedure Act, 1852,[1] he must prove that a half-year's rent was in arrear before the writ was served, and that there was not to be found on the demised premises sufficient distress to countervail the arrears.

Moreover, when a landlord seeks to enforce a forfeiture for non-payment of rent, the lessee can obtain relief under the same section. The power of granting relief given to the Courts is now a very wide one. If the lessee, at any stage of the proceedings before judgment, pays into court the rent due with costs, the action will be stayed. And even after judgment has been recovered he can obtain relief by paying such rent and costs, provided he does so within six months; and so can any assignee, mortgagee or any other person claiming under the lessee. But if no such payment be made within the six months, the lessee and all claiming under him will be barred and foreclosed from all relief or remedy, and the lessor will hold the land discharged from the lease.

In any action for the recovery of land the plaintiff may also claim any arrears of rent or "double value"[2] due to him, and damages for breach of any covenant contained in the lease or for any injury done to the premises. If the defendant be a mere trespasser, the plaintiff may add a claim for mesne profits and for any injury done to the premises. Mesne profits are the rents and profits which a trespasser has received or made during the time that he was in possession, or which he might have received or made during that period if he had used due skill and diligence. These he must hand over to the rightful owner; the amount of them is unliquidated and must be assessed by the jury.

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[1] 15 & 16 Vict. c. 76, s. 210.

[2] See *post*, p. 1259.

CHAPTER IV.

TRESPASS TO LAND.

ANY direct physical interference with the person of another or with any real or personal property in the possession of another, without his consent or other lawful authority is a trespass, if the act was done intentionally or was the result of negligence.[1] To be a trespass, the defendant's act must be a direct and immediate invasion of a private right of the plaintiff's. Thus, any wrongful entry upon the land of another, or any immediate physical interference with the possession of such land, is a trespass to land.

Any wrongful act which directly disturbs any one in his lawful possession of goods, however slight or temporary such disturbance may be, is a trespass to goods. Any direct interference with the liberty or person of another, if it be either intentional or the result of negligence, is a trespass to the person.[1] These three kinds of trespass will be separately discussed in this and the two following chapters.

Any one who is in lawful occupation of land is entitled to the exclusive use and possession of it; and any intrusion upon the premises which interferes with his enjoyment of them is a trespass. A trespass may be in its nature continuous or perpetually recurring, as where a man continues illegally in the dwelling-house of another after a forcible entry into it, or where he walks or rides daily across the field of another. "Every continuation of a trespass is a fresh trespass."[2]

It is not necessary in every case in which a trespass to land has been committed for the occupier of the land to take legal proceedings. He may, if he thinks fit, take the law into his own hands and eject the trespasser, provided he uses no more force than is necessary for the purpose. But if he acquiesces in the trespasser settling down on any portion of the land and assuming physical control over it, he cannot subsequently himself eject him from that portion.

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[1] See *Holmes* v. *Mather* (1875), L. R. 10 Ex. 261; *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

[2] *Per* Parke, B., in *Percival* v. *Stamp* (1853), 9 Exch. at p. 174.

To succeed in an action of trespass to land the plaintiff must prove—

(i.) that he was in possession of land situate in England or Wales;[1] and

(ii.) that the defendant entered on that land without his consent.

No evidence of any special damage is necessary, but if in the particular case there be any, such evidence may be given to increase the amount of the verdict. Proof of the trespass without proof of any consequential damage entitles the plaintiff to at least nominal damages; such damages are given in order to vindicate the right which has been invaded. And if there is evidence that the defendant threatens or intends to repeat his unlawful act, the Court will grant an injunction to restrain any repetition of it.[2] But an injunction will not be granted in cases in which there has been merely a technical trespass which has caused no damage.[3]

Any invasion of the plaintiff's right of property is *primâ facie* wrongful. But if the defendant can show that his act was neither wilful nor the result of negligence, his act is not wrongful and no action is maintainable.[4]

(i.) The action for trespass to land is founded upon possession; hence no one can bring this action unless he was in possession of the land at the time of the defendant's trespass, or, at least, had the right to be in possession and had actually entered into possession before bringing his action.

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[1] No action will lie in our Courts for a trespass to land situate abroad (*British S. A. Co.* v. *Companhia de Moçambique*, [1893] A. C. 602).

[2] An injunction is a peremptory order of the Court forbidding any continuance or repetition by the defendant, his servants or agents, of the wrong of which the plaintiff complains. See Injunction, *post*, p. 1106.

[3] *Llandudno U. D. C.* v. *Woods*, [1899] 2 Ch. 705; *Behrens* v. *Richards* (1906), 93 L. T. 623.

[4] See the judgment of Bramwell, B., in *Holmes* v. *Mather* (1875), L. R. 10 Ex. at p. 267.

One main distinction between an action of trespass to land and an action for recovery of land is that in the former action the plaintiff is always in possession and the defendant is always out of possession; whereas in the latter action the positions are reversed.

A man is said to be in possession of land whenever he has full and uncontrolled physical dominion over it. Thus, he is in possession of a house when he or his servants are living in it; if he or they are absent from it, he would still be held to be in possession if such absence was only temporary, or if he could return and re-enter at any moment, if he chose, without asking any one's permission and without any preliminary ceremony. But directly any other person enters into and remains on the premises without his consent, the former possessor is ousted; for two persons cannot be in possession of the same property at the same time, unless they be joint occupiers or tenants in common.

A mere right to the possession of land will not entitle the plaintiff to bring an action of trespass without entry. But actual entry, with sufficient title, on any part of the land for the purpose of taking possession of the whole is sufficient to vest possession of the whole in the lawful owner, and to make all persons previously in possession of any part of the land who remain there, and all who afterwards enter on any part of it, without his permission, trespassers. A man who has a good title to the possession of land, but who in fact is out of possession, must bring an action for the recovery of land and not an action of trespass. But as soon as such a man enters on any part of the land, he will be deemed in law to have taken possession of the whole as against those who show no title.[1]

Thus a person, to whom a lease has been granted but who has never been in possession of the property, cannot bring an action of trespass (though he can bring an action for recovery of land). Again, before entry neither a freeholder, nor the customary heir of a copyhold tenement, nor the assignee of a term of years can bring an action of trespass for an unlawful entry on the land. Nor can a mortgagee, who has never been in actual possession or never been seised of the land, unless he has obtained a judgment in an action for its recovery.[1]

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[1] *Per* Lord Blackburn in *Bristow* v. *Cormican* (1878), 3 App. Cas. at p. 661.

It is not, however, necessary in every case that the plaintiff should have been in actual possession at the time of the trespass. It is enough if he has the right to immediate possession at the time of the trespass and has actual possession at the time of bringing his action. In such a case his possession is said to relate back to the time when his right of entry accrued. So a mortgagee who has only the right to take possession may sue for trespass to the land, provided he has actually entered before bringing his action.[2]

As soon as a person entitled to the possession of land peaceably enters upon it in the assertion of that title, the law immediately vests in him the actual possession. "If there are two persons in a field, each asserting that the field is his and each doing some act in the assertion of the right of possession, the person who has the title is in actual possession and the other person is a trespasser. They differ in no other respects."[3] It cannot be supposed that there is here a joint possession, or a possession by the two as tenants in common.

If a person who is in possession of land demises it to another for a term of years or any shorter period, and the tenant enters and takes possession of the land, the landlord is out of possession, and no action of trespass will lie at his suit for an entry on the land by a stranger, but only at the suit of the tenant; he is in possession and is, therefore, the only person aggrieved.[4] And this continues so even after the expiration of the tenancy, so long as the tenant, rightfully or wrongfully, continues in possession.

A landlord who is out of possession of his land may, however, sue for any injury of a permanent kind done to his reversion (though the action strictly is not one of trespass).[5] Hence, where the injury done to the land or buildings is of a sufficiently permanent character to affect the value of the reversionary interest, the trespasser is liable to two actions—one at the suit of the tenant for the invasion of his possession, and one by the landlord for the injury done to his reversion.

Thus, if a field is demised to a farmer and a stranger constantly walks across that field, the farmer has a right to sue for the annoyance caused by these repeated trespasses and for the damage done to his grass. The landlord also will have a right to sue if the trespasses were committed in assertion of a right of way across that field; for it will injure the value of the freehold if such a right be created.

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[1] *Turner* v. *Cameron's Coalbrook Steam Coal Co.* (1850), 5 Exch. 932.

[2] *Barnett* v. *Earl of Guildford* (1855), 11 Exch. 19; *Ocean Accident Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493.

[3] *Per* Maule, J., in *Jones* v. *Chapman* (1847), 2 Exch. at p. 821; cited by Parke, B. (1850), 5 Exch. at p. 947, and by Lord Selborne in *Lows* v. *Telford* (1876), 1 App. Cas. at p. 426. And see *Wellaway* v. *Courtier*, [1918] 1 K. B. 200.

[4] *Cooper* v. *Crabtree* (1882), 20 Ch. D. 589, *ante*, p. 414.

[5] See *Dobson* v. *Blackmore* (1847), 9 Q. B. 991.

But where the right which the plaintiff claims is of such a nature that it does not entitle the plaintiff to take possession of and occupy the land on which the subject-matter of the right exists or will exist, our law must perforce dispense with entry. A man may have an exclusive right or interest in land the soil of which belongs to another; and yet such right or interest in no way entitles him to occupy the land, and therefore gives him no right to enter on it, except for the purpose of exercising his right. If any one disturbs that man's exclusive right or interest, an action of trespass will lie at his suit without proof of any previous entry.

A person who has a *profit à prendre* "has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights."[1] An action for trespass will also lie at the suit of one who has an exclusive right to cut turf in a waste belonging to the lord of the manor, should a stranger cut and carry away any of the turf; and this without proof of any previous entry. Again any one, who is entitled to the exclusive enjoyment of a growing crop during the proper period of its growth and until it has been cut and carried away, may maintain an action of trespass in respect of such exclusive right. So may any one who is exclusively entitled to the "vesture" of land, *i.e.*, to corn, grass, underwood, &c., growing upon it.[2]

(ii.) Next, the plaintiff must prove that the defendant entered on land of which the plaintiff was in possession. Any entry upon the land of another, if unauthorised by him and unjustified by law, is a trespass and actionable, even though no damage be done. "In determining the question of trespass or no trespass the Court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it."[3]

And here note an important distinction between an entry by a trespasser and an entry by the true owner of land. If, as we have seen,[1] the man who has a good title to the land enters upon any portion of it with the intention of taking possession of the whole, he is deemed in law to be at once in possession of the whole. If, however, a trespasser enters upon any portion of the land, even with the intention of taking possession of the whole, and is promptly ejected by the occupier, he is never in possession at all; he has merely committed a trespass. But if, through the timidity or acquiescence of the occupier, the trespasser succeeds in establishing himself in possession of a portion of the land, nevertheless he is not in possession of the whole, but only of so much of it as is under his direct physical control. If, however, the trespasser ejects all other occupiers of the land or induces them to hold as tenants under him, he will be in possession of the whole; for the whole is now under his direct physical control. And in this event the only remedy of the rightful owner is an action for the recovery of land.

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[1] *Per* Lindley, L. J., in *Fitzgerald* v. *Firbank*, [1897] 2 Ch. at p. 101.

[2] *Cox* v. *Glue* (1848), 5 C. B. 533; *Johnson* v. *Barnes* (1873), L. R. 8 C. P 527; and see *Mills* v. *Brooker*, [1919] 1 K. B. 555.

[3] *Per* Lord Camden in *Entick* v. *Carrington* (1765), 19 St. Tr. at p. 1066.

If the rightful owner of land forcibly enters and ejects a person wrongfully in possession, he commits, as we have seen,[2] a crime under the old statute 5 Rich. II. st. 1, c. 7. Yet it seems that the former occupier cannot treat the lawful possessor as a trespasser, or claim damages for such an entry;[3] for the possession shifted as soon as the rightful owner entered.

"Damages cannot be recovered against the rightful owner for a forcible entry on land. . . . The result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the forcible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute 5 Rich. II. creates a crime, it gives no civil remedy." [4]

But if after entry the rightful owner proceed to forcibly eject the former occupier and his goods, it is by no means clear that the former occupier cannot sue for the assault and the damage, if any, done to his goods. Can a forcible entry give such lawful possession as will, in a civil action, justify such assault and damage? On the one hand may be cited the *dicta* of Parke, B., in *Harvey* v. *Bridges*,[1] apparently approved by Lord Selborne in *Lows* v. *Telford*,[2] and on the other the judgment of Fry, J., in *Beddall* v. *Maitland*,[3] supporting the opinion of the majority of the Court of Common Pleas in *Newton* v. *Harland*.[4] The fact that the former occupier cannot obtain damages for the forcible entry is by no means conclusive on the question:[5] because the rightful owner cannot allege that his subsequent acts were lawful, unless they were justified by a lawful entry.

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[1] See *ante*, p. 447.

[2] See *ante*, p. 170.

[3] See *Davison* v. *Wilson* (1848), 11 Q. B. 890; *Burling* v. *Reed* (1848), 11 Q. B. 904; *Meriton* v. *Coombes* (1850), 1 L. M. & P. 510.

[4] *Per* Fry, J., in *Beddall* v. *Maitland* (1881), 17 Ch. D. at p. 188.

The entry need not be by the defendant in person. If a servant enters on the plaintiff's land at his master's bidding, the master is as liable in every way for such trespass as he would have been if he had gone himself.[6] Again, a man is also answerable for any trespass committed by his horses, cattle or other tame animals. For if they escape from his premises and stray upon the land of another—much more if he permits or drives them on—and they there tread down his neighbour's herbage, and spoil his corn or his trees, or attack and injure his cattle, this is a trespass for which damages can be recovered.[7] The law gives the occupier of land a double remedy in this case by permitting him either to sue for the trespass or to distrain the cattle thus doing damage[8] till the owner shall compensate him therefor. When cattle are thus distrained, no property or even possession passes to the distrainor; they are merely seized and detained in a pound as a pledge for payment, and are said to be in the custody of the law. The method by which the owner recovers back his cattle is explained in the next chapter under the title "Replevin."[9]

There are many different defences to an action of trespass to land. The defendant may of course dispute the plaintiff's possession or deny any entry by himself. Or he may set up an affirmative case, asserting that he had a right to enter on the land in question. He may justify his entry by showing some title or authority in himself, or the consent of the plaintiff to his entry, express or implied. In either case he must set out in his pleading the facts on which he relies as justifying an act *primâ facie* tortious. The fact that the defendant did not know that his entry was wrongful, or that he did not intend any harm by it, is no defence to the action, if in fact it was either intentional or negligent.[1] Thus it will be no defence to an action of trespass to land that the defendant honestly believed that the land on which he trespassed was his own freehold, if it was not, or that he had a right to ride across it, when he was out fox-hunting.[2]

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[1] (1845), 14 M. & W. at p. 442.

[2] (1876), 1 App. Cas. at p. 426.

[3] (1881), 17 Ch. D. at p. 187.

[4] (1840), 1 M. & Gr. 644.

[5] See Pollock, Law of Torts, 8th ed., p. 386.

[6] It will of course be otherwise if the servant's act was in contravention of the master's orders (*Joseph Rand, Ltd.* v. *Craig*, [1919] 1 Ch. 1).

[7] *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10; *Cooker* v. *Willcocks*, [1911] 2 K. B. 124; *Holgate* v. *Bleazard*, [1917] 1 K. B. 443; *Wellaway* v. *Courtier*, [1918] 1 K. B. 200; *Theyer* v. *Purnell*, [1918] 2 K. B. 333.

[8] Such cattle were called by the old lawyers "cattle damage feasant." See *post*, p. 967.

[9] *Post*, 462.

The most common form of justification is the assertion by the defendant that he was seised of an estate of freehold in the land, whether in fee simple, in tail or for life.[3] Such estate must, of course, be in possession; an estate in remainder or reversion would give its owner no right to enter on the land. And to a plea of an estate of freehold in possession it will be a good answer, if the plaintiff can show that the defendant or some ancestor of his had granted him a lease of the premises for a term which has not yet expired.[4] So too it will be a defence to an action of trespass, if the defendant can show that he is the lessee of the freeholder and that the freeholder was entitled to grant him a lease and place him in possession under it. Again, the defendant may justify a *primâ facie* trespass by showing that he had some lawful right to enter on the land—*e.g.*, to peaceably retake possession of his goods or cattle, to demand or pay money there payable, to execute in a legal manner the process of the law, or in the exercise of any public or private right of way.

Thus, the entry of a landlord to distrain for rent due is justifiable; so in some cases is an entry on a neighbour's land to abate a nuisance, or to prevent the commission of a crime or the spreading of a fire;[1] so, again, is the entry of a commoner on the common to exercise any right of common there, or of a landlord to see if any waste be committed on the estate, or any breach of a covenant to repair. So, too, the inhabitants of a particular township or place may by immemorial custom possess the right to enter on the land of another in order to play lawful games there or to draw water.[2]

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[1] *Holmes* v. *Mather* (1875), L. R. 10 Ex. 261: *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

[2] *Paul* v. *Summerhayes* (1878), 4 Q. B. D. 9.

[3] This was formerly called a plea of *liberum tenementum*. It is now usually accompanied by a counterclaim for possession of the land.

[4] Year Book 5 Hen. VII., 10 a, pl. 2; Odgers on Pleading and Practice, 8th ed., p. 268.

But in all these cases the authority under which the defendant entered was vested in him for a specific purpose. If after entry he commits any act of trespass unconnected with this purpose, such an act destroys his whole defence, and he becomes what is called a trespasser *ab initio.*

Thus, where a landlord, after entering on his tenant's land to distrain for rent due to him, works or kills the animals or cattle which he has distrained; or where a lessor, who has entered on demised premises to see if his tenant is committing waste, breaks open the house or stays there all night; or where a commoner cuts down a tree growing on the common—in each of these cases the lawful entry will not excuse the subsequent trespass.

Again, where the plaintiff used a highway, the soil of which was vested in the defendant, not for the purpose of passing and repassing, but of interfering with the defendant's right of shooting over certain moors which adjoined the highway, it was held that the plaintiff was a trespasser although he was on a highway.[3] "If a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made, . . . he is a trespasser."[4]

The defendant may also set up as a defence that he had leave and licence from the plaintiff to enter on his land. Such leave and licence may be either express or implied. If a shopkeeper leaves his shop door open during business hours, he will be deemed to give permission to any one to enter his shop who desires to purchase any of his wares or to inspect his stock-in-trade. So any one is entitled to enter, during the proper hours of the day, an inn or public-house without any special leave from the publican, because by the profession of his trade he invites all and any, subject to statutory restrictions, to enter his doors, provided of course that there is suitable accommodation at his disposal, and that the guest applies peaceably for admission and is ready and able to pay reasonable compensation for the food and drink supplied to him.[1] But such permission must not be abused. If after a lawful entry he commits a trespass on the premises, he will be presumed to have entered with the intention of committing that trespass; and he will be accounted a trespasser *ab initio*.

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[1] *Handcock* v. *Baker and others* (1800), 2 Bos. & P. 260; *Cope* v. *Sharpe*, [1912] 1 K. B. 496.

[2] See Customary Rights, *post*, p. 580.

[3] *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142. Proof of such misconduct in the defendant will also increase the amount of damages recoverable: see *Merest* v. *Harvey* (1814), 5 Taunt. 442, and *post*, Book V., Chap. XXI., Aggravation of Damages.

[4] *Per* Lopes, L. J., [1893] 1 Q. B. at p. 145.

Thus, "if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner, this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of contract."[2]

Lastly, there may be circumstances in which the defendant would naturally expect and believe that the plaintiff, if he were aware of them, would at once have given him leave to enter on his premises, *e.g.*, if the defendant was being pursued by a bull or a mad dog, or if the plaintiff's own house was on fire and the defendant wished to enter to assist in extinguishing the flames. In such cases, of course, no reasonable man would dream of bringing an action; nevertheless, it may be doubted whether such circumstances would, in strict law, afford any excuse for an entry without permission.

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[1] See *Doe* d. *Hudson* v. *Leeds and Bradford Ry. Co.* (1851), 16 Q. B. 796. An innkeeper is not, however, bound to provide for his guest the precise room which the latter may select; all that the law requires of him is to find for his guest reasonable and proper accommodation: *Fell* v. *Knight* (1841), 8 M. & W. 269, 276. Nor is an innkeeper bound to receive into the bar attached to his inn a customer with his dogs: *R.* v. *Rymer* (1877), 2 Q. B. D. 136. As to the obligation of an innkeeper to receive goods, see the remarks *per cur.* in *Broadwood* v. *Granara* (1854), 10 Exch. at p. 417.

[2] 3 Bl. Com., p. 213; and see *The Six Carpenters' Case* (1610), 8 Rep. 146 a; 1 Smith, L. C., 12th ed., 145.

CHAPTER V.

TRESPASS TO GOODS, DETINUE AND CONVERSION.

WE now turn to personal property. Our law provides several different methods of vindicating the right of possession. In this chapter we propose to deal with five separate causes of action:—Trespass to Goods, Detinue, Replevin, Wrongful Distress and Conversion. These can perhaps best be illustrated by preliminary examples.

Let us suppose that A. is in lawful possession of goods. It does not matter whether he is the true owner, or whether he is in possession of them with the consent of the true owner. All that is necessary is that he should be entitled to the immediate possession of them.

Next, suppose that B. wrongfully seizes those goods and takes them out of A.'s possession; or that in some other way he personally applies direct force to the goods. It does not matter whether such wrongful force damages the goods or not; for B. had no right to touch them at all. The mere infringement of A.'s right of possession entitles him to recover some damages from B. If B. seized the goods or caused them to be seized in any open or notorious manner, so as to injure A.'s reputation or so as to cast doubt on A.'s right to the possession of the goods, a larger amount of damages may properly be awarded—*e.g.*, if B. distrained them for rent which was not due, his act will clearly cast doubt on A.'s solvency. If in removing the goods B. breaks or injures them, the amount of damages which he must pay will be still further increased. This is A.'s first cause of action—viz., trespass to goods.

Next, let us assume that B. removes the goods to some premises of his own, and keeps them there without A.'s consent. Here at once a second cause of action arises—viz., an action of detinue. For, in addition to the insulting invasion of his right of possession, A. is now deprived of the use and enjoyment of the goods to which he is entitled. In the case of household furniture, for instance, it may be that he has no longer a table to sit at or a chair to sit on; in the case of wares and merchandise, his business will no doubt be injured by this sudden and unlawful reduction of his stock-in-trade. The amount of damages which B. must pay for this detention will, of course, depend on the length of time for which he withholds them from A.

But all this time the goods remain the property of the true owner. B.'s unlawful acts in no way affect the title to the goods. If A. be the owner of the goods, he cannot so far claim to be paid the value of them by B.; for, as we shall see, he is entitled to have them returned to him. But we will now suppose that B. does some further wrongful act which amounts to an assertion of ownership in himself: as, for instance, if he sells them to an innocent purchaser in market overt or wantonly destroys them. He has now permanently deprived A. of the use and enjoyment of the goods; he has deprived A. of his whole interest in them. He has also deprived the true owner, if he be other than A., of his property in the goods. B. is therefore liable for the full value of the goods, whether he acted in good faith in ignorance of the true owner's title or not; and A. can recover the full value of the goods, even though his interest in them be a limited or partial one. The wrong-doer cannot set up that A. had only a partial interest, though if A. recovers the whole value he may have to account to the owner for the value of the latter's interest in the goods.[1] Here, then, we have a third cause of action in A., which is called an action of conversion.

Now let us suppose that B., instead of destroying the goods, sells them to C., an innocent purchaser for value, but not in market overt, and that C. had no reason to suppose that B. was not the true owner of them. No property in the goods passes to C., because B. had no property to pass. C. is not to blame in the matter, and so far no action lies against him. But as soon as A. discovers where the goods are and gives C. notice of his title and demands possession of the goods from him, any further detention of them on the part of C. will be a tort. He is entitled to a reasonable time for making proper inquiries; if he ascertains nothing to cast doubt on A.'s claim, he ought to return them to him at once. If he fails to do so, he will be liable for damages in an action of detinue. Moreover the refusal to give the goods up, after a formal demand duly made, is some evidence to go to the jury of a conversion. But C. will in no case be liable to pay any damages for the original trespass; he has not directly violated the true owner's possession.

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[1] *The Winkfield*, [1902] P. 42.

Lastly, if B. sold the goods to C. for a full price, the true owner of them may, if he thinks fit, waive the tort and recover from B. the money which C. paid him.[1]

Under the old common law there were four different remedies for the wrongful deprivation of goods, viz.:—the actions of trespass to goods, detinue, replevin and trover.[2] Trespass and trover were actions to recover damages merely; the first for the injury to the possession, the second for the loss of the property; but the actions of detinue and replevin were both brought for the return of the goods. The actions of trespass and replevin could be maintained against any one who forcibly took the goods out of the possession of the plaintiff; the actions of detinue and trover lay also against any person who subsequently came into possession of the goods by any means and wrongfully withheld them from the plaintiff. In trespass and replevin the plaintiff was always in possession of the goods and the defendant out of possession at the time when he commenced his wrongful acts. In detinue and trover, on the other hand, the plaintiff was always out of possession and the defendant in possession of the goods when the tort was committed.

These were all actions founded on the right of possession. Curiously enough, there was no form of action at common law merely to determine a dispute as to the ownership of the goods, though questions of ownership would frequently arise indirectly, as, for example, if the defendant in justification of his conduct asserted that the goods were his and that he had therefore an immediate right to the possession of them. But now, since 1883, a plaintiff can bring a separate action to obtain from the Court a declaration that certain goods are his property without claiming possession of them or asking for any other consequential relief; he can even do so although no such relief could in the circumstances be claimed.[1]

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[1] *Smith* v. *Baker* (1873), L. R. 8 C. P. 350.

[2] This was the old name for an action of conversion. As the defendant was not charged with any trespass, it was assumed that he had innocently *found* the goods somewhere, and then wrongfully converted them to his own use.

But since the Judicature Act, 1873, strict forms of action are abolished.[2] The test of obtaining relief is whether the suitor has a good cause of action of any kind, however his pleadings may be framed. The plaintiff need no longer precisely formulate his claim in detinue, trespass or trover. It will be sufficient if on the facts, which he has alleged in his pleadings and proved at the trial, he is entitled to judgment in any form of action. And a claim for the return of the goods or their value can now be joined in the same action as a claim against the same defendant for damages for detinue or trespass.

TRESPASS TO GOODS.

Any wrongful act which directly disturbs any one in his lawful possession of goods, however slight or temporary such disturbance may be, is a trespass to goods. If the defendant directly causes any damage to the goods while they are in the plaintiff's possession, or without damaging them wrongfully seizes or touches them in any manner which directly disturbs the plaintiff's right of possession—*à fortiori*, if he removes them out of the actual and immediate control of the plaintiff without his consent—he is guilty of a trespass, for which an action will lie without proof of any special damage or of malice.[3]

To succeed in such an action the plaintiff must prove—

(i.) that he was in actual possession of the goods in question (though in some cases, apparently, it is sufficient if he proves that he was legally entitled to the immediate possession of them); and

(ii.) that by some act of the defendant's his possession of them was disturbed.

In former times the right to bring an action of trespass to goods was confined to the man, or the personal representatives of the man, who was in possession of the goods at the time when the trespass was committed. But now in some cases a person in whom is vested a present right to the immediate possession of goods is permitted to bring this action.[1] If the owner of the goods is in possession of them at the date of the trespass, he of course can sue. But if he voluntarily places the goods in the exclusive possession of another person (who is not his servant) for a definite period, that other is —during the period—the only person who can bring an action of trespass. As soon as the period has expired, if the goods be not returned, both the owner and the other person can sue—the latter, because he is in possession of them; the owner, because he has now a right to have them returned to him. A servant is not deemed to be in possession of the things which he holds and uses on behalf of his master; he has merely the custody of them: his master has the possession, and he alone can sue.

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[1] Order XXV., r. 5; and see *London Association of Shipowners, &c*, v. *London and India Docks*, [1892] 3 Ch. 242; *North Eastern Marine, &c., Co.* v. *Leeds Forge Co.*, [1906] 2 Ch. 498.

[2] *Hanmer* v. *Flight* (1876), 35 L. T. 127.

[3] As to the distinction between an action of trespass and an action on the case in this respect, see *Clissold* v. *Cratchley*, [1910] 2 K. B. 244.

It is a trespass to goods to write defamatory matter across the face of a conductor's licence or a servant's character; such writing disturbs the plaintiff in the enjoyment of his rights.[2]

An executor's right to the goods of the testator accrues immediately on his death, so that an executor can maintain an action of trespass to the goods of the testator if they are interfered with by a stranger between the death and grant of probate. So an administrator may sue for a trespass to the goods of his testator committed between the death and the grant of letters of administration. The possession of the deceased enures for the benefit of his personal representative.[3]

Again, if goods are delivered to a bailee and are taken out of the bailee's possession by a stranger, the bailee has all the rights and remedies which the owner would have had if there had been no bailment. And so has the bailor in those cases of bailment in which he is entitled to resume possession of his goods at will, such as a deposit for safe custody or a gratuitous loan. In other cases he cannot sue, because he has neither possession nor a right to the immediate possession. And if the owner has contracted to give the bailee exclusive possession of his goods, as upon a hiring or pledge, his right to recover the goods from strangers wrongfully possessed of them is suspended during the continuance of the bailment. But when a bailment of any kind is determined, the owner may sue to recover his goods or their value from any person into whose hands they may have come, as well as from the bailee.[4]

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[1] *Bailiffs of Dunwich* v. *Sterry* (1831), 1 B. & Ad. 831; but see *R.* v. *Clinton* (1869), 4 Ir. R. (C. L.) 6.

[2] *Hurrell* v. *Ellis* (1845), 2 C. B. 295; *Rogers* v. *Macnamara* (1853), 14 C. B. 27; *Wennhak* v. *Morgan* (1888), 20 Q. B. D. 635.

[3] *Morgan* v. *Thomas* (1853), 8 Exch. 302; *Kirk* v. *Gregory* (1876), 1 Ex. D. 55.

[4] *Lotan* v. *Cross* (1810), 2 Camp. 464; *White* v. *Morris* (1852), 11 C. B. 1015; and see *Johnson* v. *Diprose*, [1893] 1 Q. B. at p. 515.

A man will be liable for trespasses to the goods of another committed by his servants or agents in the ordinary course of their employment, and even in some cases by his animals, which are or ought to be under his control.[1]

Thus, where the defendants' horse injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendants', it was held that there was a trespass by the act of the defendants' horse, for which the defendants were liable, apart from any question of negligence on the part of the defendants.[2]

But where A., the owner of land, contracts with B. to erect buildings upon it, and B.'s workmen carry away materials belonging to the owner of the adjoining land, A. will not be liable, unless he in some way authorised the tortious act.[3]

Where permanent injury is done to any goods by the trespasser, any person who has a reversionary interest in the goods may sue at once to recover damages for this injury—*à fortiori*, if the goods be destroyed; but such action is not an action of trespass.[4]

Suppose that A. borrows a bicycle from his friend B. for a day's excursion into the country. Through no fault of his A. is knocked down by a motor car and the bicycle is smashed to pieces. Here A. no doubt has an action for any physical injuries he may have sustained, and also perhaps for the loss of his day's holiday. He can also claim the full value of the bicycle from the motorist, even though he would have had a good answer to an action brought by B. for the value of the bicycle.[5] B. can also sue the motorist for the value of the bicycle, though of course the latter cannot be made to pay twice over.

When the plaintiff has thus proved a *primâ facie* case, it will be for the defendant to justify his act of trespass, if he can. He may be able to show that the goods in question were wrongfully upon his premises, and that he was therefore entitled to remove them. Thus, if the plaintiff's cattle had strayed on to the defendant's land and done damage there, he might distrain them as cattle damage feasant. But he need not do so unless he wishes;[1] and he cannot legally do so unless damage has in fact been done.

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[1] See *post*, pp. 509, 510; and 28 & 29 Vict. c. 60.

[2] *Ellis* v. *Loftus Iron Co.* (1874), L. R. 10 C. P. 10; and see *Lee* v. *Riley* (1865), 18 C. B. N. S. 722.

[3] *Gayford* v. *Nicholls* (1854), 9 Exch. 702.

[4] *Tancred* v. *Allgood* (1859), 28 L. J. Ex. 362; *Lancashire Waggon Co.* v. *Fitzhugh* (1861), 6 H. & N. 502.

[5] See *The Winkfield,* [1902] P. 42.

Or it may be that the plaintiff had brought his goods on to the defendant's premises, and had there so mixed them with the goods of the defendant that the defendant in taking possession of his own unavoidably committed a trespass to the plaintiff's goods.[2] Or again the defendant may prove that the plaintiff's goods were obstructing the highway and that he had authority to remove them under the provisions of some statute.[3] Again, the plaintiff may have authorised the defendant to seize his goods in certain events—under a bill of sale or otherwise.[4]

Lastly, the alleged trespass might have been committed in executing the process of the law. In such a case, if the act is done in obedience to an order of a Court of competent authority acting within its jurisdiction, the plaintiff cannot succeed in his action.

Detinue.

The action of detinue lies against any one who unlawfully detains goods from the owner or other person entitled to the immediate possession of them. The object of the action is to compel him to return the goods to the plaintiff and pay him some damages for the deprivation of them. But if the defendant cannot return the goods, he must pay the plaintiff their value. The action is not confined, as is an action of trespass, to the person who directly violates the plaintiff's right of possession; it lies against any one who has subsequently come into possession of the goods, whether innocently or in collusion with the original trespasser.

Hence, in order to succeed in an action of detinue, the plaintiff must prove—

(i.) that he has a right to the immediate possession of the goods;

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[1] *Tyrringham's Case* (1584), 4 Rep. 36 a; *Carruthers* v. *Hollis* (1838), 8 A. & E. 113.

[2] *Wyatt* v. *White* (1860), 5 H. & N. 371.

[3] *Le Neve* v. *Vestry of Mile End* (1858), 8 E. & B. 1054; and see *Morant* v. *Chamberlin* (1861), 6 H. & N. 540.

[4] See *ante*, p. 32.

(ii.) that the defendant is in possession of the goods; and
(iii.) that he wrongfully withholds them from the plaintiff.

On proof of these facts, the plaintiff is entitled to a judgment in a special form, which orders the defendant to return the goods to the plaintiff or to pay him their value, and also to pay him damages for the detention of them. But although this form of judgment appears to leave to the defendant liberty either to return the goods or pay the plaintiff their value as he pleases, the law no longer gives the defendant such an option. If the plaintiff insists upon it, the defendant must return the goods, if he still has them, or go to prison;[1] he is not entitled to keep the goods on payment of the sum which the jury has assessed as their value, except by the plaintiff's consent.

The defence most usually set up in an action of detinue is that the defendant has a lien on the goods. A lien, as we have seen,[2] is a right to retain possession of the goods of another until that other pays a debt or does something else which he has agreed to do. But a lien is lost as soon as the goods return into the possession of their owner; hence a lien is never a defence to an action of trespass.

Another defence is that the defendant found the goods and did not know or was not satisfied that the plaintiff was the rightful owner. When a chattel is found in a place to which the public have access, the finder acquires a title good against all the world except the true owner.[3]

Or the defendant may say that he is joint owner of the property with the plaintiff, and so entitled to detain it;[4] or he may assert that the plaintiff is one of two or more joint owners who delivered the property into his hands, and that the others have not demanded the re-delivery of the goods.

REPLEVIN.

This is an action of tort, in which the plaintiff claims damages for the seizure of his goods and the unjust detention of them until sureties or pledges were given. "Replevin" is an old word which signifies a re-delivery to their owner of goods or cattle, which have been taken from him, upon his giving security that he will commence and duly pursue an action against the person by whose orders they were taken, and return them should he fail in the action.

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[1] Order XLVIII., r. 1; and see *Hymas* v. *Ogden*, [1905] 1 K. B. 246; *Bailey* v. *Gill*, [1919] 1 K. B. 41.
[2] *Ante*, p. 28; and see *Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585.
[3] *Armory* v. *Delamirie* (1722), 1 Smith, L. C., 12th ed., 396.
[4] See *The Walter D. Wallet*, [1893] P. 202.

The action generally arises where goods have been distrained for arrears of rent, or where cattle have been straying and doing damage, or where an animal is seized as a heriot. In such cases, if the owner believes that the seizure was wrongful, he gives a formal notice to the registrar of the county court of the district in which the goods or cattle were seized (formerly to the sheriff of the county), claiming their return. He must in such notice state his intention of bringing an action and his willingness to give adequate security, either by depositing money or by executing a bond with sureties; and in the latter case he should name the persons whom he proposes as sureties. The registrar, after notice to the seizor, fixes the amount for which security must be given; the security is completed either by depositing that amount in court or by executing the bond, and the goods or cattle are returned to the owner, who must then commence an action of replevin (generally within one week) and prosecute it without delay.[1] It is then for the defendant to justify his act, *e.g.*, by showing that he had a right to distrain the cattle as they were doing damage on his land. The action lies only against the distrainor or other person who actually takes the goods out of the plaintiff's possession.

WRONGFUL DISTRESS.

Somewhat analogous to an action of replevin is an action for wrongful distress—save that in the latter action the plaintiff does not seek to recover his goods, but only compensation for their seizure and sale. If a tenant fails to pay his rent at the proper time,[2] his landlord has a right to distrain practically all his goods, and in some cases also the goods of a third person, which are then upon the demised premises, and after certain formalities he may proceed to sell them. The right to seize the goods is by law inherent in the relation of landlord and tenant.[1] But this right may be made an instrument of oppression; it is therefore jealously guarded and must always be exercised with extreme caution.

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[1] See 51 & 52 Vict. c. 43, ss. 133—137.

[2] In *Child* v. *Edwards*, [1909] 2 K. B. 753, Ridley, J., held that, if rent fell due on a Sunday and was not paid on that day, the landlord could distrain on the Monday. And see *Gelmini* v. *Moriggia*, [1913] 2 K. B. 549.

If a landlord distrains the goods of his tenant when no rent is due, his action is illegal *ab initio*; his entry is an indefensible trespass to land; his subsequent seizure of the goods is an equally indefensible trespass to goods; while the subsequent sale of them will render him liable to an action of conversion. If some rent is due, his original entry is lawful; but if he distrains goods which are privileged from distress, he commits a trespass, and here again the distress is illegal.[2]

If the landlord distrains for the right amount of rent due, but seizes a much larger quantity of goods than is necessary to satisfy the arrears, he is liable to an action for an excessive distress under the Statute of Marlbridge.[3] The excess of the value of the goods distrained above the arrears of rent due must be unreasonably great. The landlord "is not bound to calculate very nicely the value of property seized; but he must take care that some proportion is kept between that and the sum for which he is entitled to take it." [4]

If the landlord distrains for more rent than is due, but does not seize or carry away an excessive amount of goods, he is liable to an action for an irregular distress; and so he is where he distrains for the right amount of rent, but neglects some requirement which the law has imposed for the protection of the tenant,[5] *e.g.*, if he gives the tenant no fair opportunity of paying him the arrears of rent before the goods are seized, or if no precautions are taken by advertisement or otherwise to secure a good attendance at the sale.

In an action for an illegal distress the plaintiff need prove no special loss, for the defendant's act is a trespass. So in an action for an excessive distress no pecuniary damage need be shown; the temporary deprivation of the use and enjoyment of the goods unnecessarily distrained is in itself a sufficient damage to sustain the action.[1] But in an action for an irregular distress the plaintiff must establish that he has suffered some special loss through and by means of the irregularity of which he complains; he must show, for instance, that his goods realised less than they ought to have done at the broker's sale because it was conducted irregularly. Without proof of some such special damage an action for a merely irregular distress will fail.[2]

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[1] This is an instance of an implied hypothecation; see *ante*, p. 31.

[2] 51 Hen. III. st. 4; see *post*, pp. 890—893.

[3] 52 Hen. III. c. 4.

[4] *Per* Bayley, J., in *Willoughby* v. *Backhouse* (1824), 2 B. & C. at p. 823.

[5] See 2 Will. & M. sess. 1, c. 5; and *Sharp* v. *Fowle* (1881), 12 Q. B. D. 385.

A landlord cannot, as a rule, distrain a second time on the same land for the same rent, unless the tenant by some tortious conduct prevented his deriving the benefit to which he was entitled from the first distress.[3] If he wrongfully distrains a second time, he will be liable to actions of trespass and conversion.

CONVERSION.

When one man who is wrongfully in possession of the goods of another does any act which amounts to an unequivocal assertion of ownership in himself, such as selling them or destroying them, he is said to convert them to his own use.[4] He thereby becomes liable to an action of conversion; he was probably already liable to an action of detinue. The action of conversion is brought to recover the value of the goods as damages, not the goods themselves. It lies against any one who has come into possession of the goods by any means and has assumed dominion over them. If on demand by the rightful owner he refuses to give them up to him, such refusal is evidence of a conversion to his own use.

If a third person wrongfully converts to his own use goods in bailment, the right to recover possession of them depends on the nature of the bailment. If it confers on the bailee a right to exclude the bailor from possession, the bailee alone can bring an action of conversion against such third person; but if it does not confer any right on the bailee to exclude the bailor from possession, then either (but not both) can maintain an action of conversion. For example, a pawnbroker or hirer of goods alone can bring an action of conversion so long as the pawning or hiring continues. On the other hand, where the bailment consists of a gratuitous loan of goods, either the bailor or the bailee can maintain such an action. But if the bailee himself converts the goods to his own use, the bailor can bring an action of conversion against him, whether the bailment be of a nature to exclude the bailor from possession or not. Where the bailee is entitled to sue, he can recover the full value of the goods converted, although he would have had a good answer to an action by the bailor for damages for the loss of the goods.[1]

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[1] *Glynn* v. *Thomas* (1856), 25 L. J. Ex. 125; *Lucas* v. *Tarleton* (1858), 27 L. J. Ex. 246; and see *Thwaites* v. *Wilding and another* (1883), 11 Q. B. D. 421 (affirmed 12 Q. B. D. 4), which was an action for an irregular, not an excessive, distress, as the plaintiff's complaint was that the landlord had distrained for more rent than was due, not that he had seized more goods than necessary.

[2] 11 Geo. II. c. 19, s. 19.

[3] *Lee* v. *Cooke* (1858), 3 H. & N. 203.

[4] *Lancs. and Yorks. Ry. Co.* v. *MacNicoll* (1918), 88 L. J. K. B. 601.

In order to succeed in an action of conversion the plaintiff must prove—

(i.) that he had a right to the immediate possession of the goods; and

(ii.) that the defendant was in possession of the goods and converted them to his own use.

On proof of these facts, the plaintiff will be entitled to recover as damages the loss which he has sustained.

(i.) The ownership of goods *primâ facie* involves the right to their possession. Hence the owner of goods can, as a rule, bring an action for their conversion by a stranger. If, however, he has voluntarily parted with them to another for a definite time or purpose, he has no right to the immediate possession of the goods and cannot sue for their conversion by a third person, until that time has elapsed or that purpose has been effected. During such period only the person who is entitled to be in possession of them could sue the wrongdoer.

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[1] *The Winkfield*, [1902] P. 42, overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422.

It is not necessary that the plaintiff should be the owner of the goods, if as against the defendant he is lawfully in possession of them. Where the title in a chattel is not good against all the world, but is good against the defendant, the man in possession has a right of action against the defendant if he wrongfully deprives him of the use or possession of his chattel. "The law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer and cannot defend himself by showing that there was title in some third person; for against a wrong-doer possession is a title."[1] Even if the defendant be the owner of the goods, it may well be that the plaintiff is entitled to retain possession of them, *e.g.*, if the defendant's predecessor in title had let them to the plaintiff for a period, which had not yet expired.

An action of conversion "will lie for grouse killed on a man's lands by a stranger."[2]

In the famous case of *Armory* v. *Delamirie*[3] a chimney-sweeper's boy found a ring set with jewels and took it to a goldsmith's shop. The apprentice took out the stones, offered the boy three-halfpence and, when he refused to accept that sum, returned him the socket and retained the stones. It was held that the boy had a title to the jewels good against all except the true owner, that the goldsmith was liable for the act of his apprentice, and further that the jury, in assessing damages, should assume that the jewels were of the finest water, unless the defendant proved that such was not the case. Bare possession, therefore, gives a sufficient legal title to enable the plaintiff to sue for any injury to the goods.

But the purchaser of goods which remain in the vendor's possession subject to his lien for unpaid purchase-money cannot maintain an action of conversion against a stranger who wrongfully takes them out of the vendor's possession; for though the purchaser is the owner of the goods, he has no right to the immediate possession of them. Only the vendor could sue in such a case.[4]

Again, an action of conversion will not lie for current money; for the former owner of it has no right to the return of the identical coins. It is otherwise in the case of an ancient or foreign coin, which has an identity of its own.[5]

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[1] *Per* Lord Campbell, C. J., in *Jeffries* v. *G. W. Ry. Co.* (1856), 5 E. & B. at p. 805.

[2] *Per* Parker, J., in *Fitzhardinge* v. *Purcell,* [1908] 2 Ch. at p. 168; and see *Hadesden* v. *Gryssel* (1607), Cro. Jac. 195; *Sutton* v. *Moody* (1697), 1 Ld. Raym. 250.

[3] (1722), 1 Str. 505; 1 Smith, L. C., 12th ed., 396.

[4] *Lord* v. *Price* (1874), L. R. 9 Ex. 54.

[5] *Orton* v. *Butler* (1822), 5 B. & Ald. 652.

(ii.) Next, we must define what acts will amount to a conversion. Any act which permanently deprives the owner of the benefit of his property is, of course, a conversion. So is any dealing with the goods in a manner which is clearly inconsistent with the owner's title.[1] Thus, destroying the goods will be a conversion, but damaging them in such a way as leaves them still of value is not. If a man without right or authority sells or pawns the goods of another, or hands them over to a third person with the intention of transferring to him the property or any possessory interest in or charge or lien upon them, he is guilty of a conversion.[2] But a mere verbal assertion by the defendant that the goods are his and not the plaintiff's, though it may be a slander of title, is not in itself a conversion. "If a man sells a book in my library without meddling with it, he does me no harm; but if he takes it away and sells it in market overt, I lose my book," and shall consequently be entitled to redress as against the wrong-doer.[3]

A conversion is often preceded by trespass, which may have been committed by the defendant or by some one else. But this is wholly immaterial on the question of conversion. The present defendant will be liable to pay the plaintiff the full value of the goods which he has converted to his own use, although the plaintiff may be also entitled to damages against a third person for some previous disturbance of his possession or detention of the same goods. The defendant may have come into the possession of the goods innocently; he may not know whose the goods are. But if he has as a matter of fact converted them to his own use, he must pay the plaintiff their value.

Thus, if a man finds something which the owner has dropped in a public place, he is entitled to keep it until the owner applies to him for it. If he then refuses to give it up to the owner, although no doubt exists as to his ownership, such refusal will be evidence of a conversion which will be strengthened if he persists in his refusal.

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[1] See *Fowler* v. *Hollins* (1875), L. R. 7 H. L. 757; *Chinery* v. *Viall* (1860), 5 H. & N. 288; and *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441.

[2] *Hiort* v. *L. & N. W. Ry. Co.* (1879), 4 Ex. D. 188.

[3] *Per* Coleridge, J., in *Cort* v. *Ambergate, &c., Ry. Co.* (1852), 1 E. & B. at p. 120.

Again, an auctioneer who in the ordinary course of his business sold goods which had been stolen was held guilty of a conversion, although he had no notice of the apparent owner's want of title, because he had "assumed to dispose of them." [1] But "a sheriff, high bailiff or other officer charged with the enforcement of a writ, warrant or other process of execution" would not be liable, unless he had notice or might have ascertained that the goods sold were not the property of the execution debtor. [2]

So, if a banker collects a bill or cheque for one who has no title to the proceeds, he will be guilty of a conversion, unless the circumstances are such that the Bills of Exchange Acts, 1882 and 1906,[3] afford him protection.[4]

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[1] *Consolidated Co.* v. *Curtis,* [1892] 1 Q. B. 495.

[2] Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. V. c. 34), s. 15.

45 & 46 Vict. c. 61 ; 6 Edw. VII. c. 17.

[4] *Kleinwort, Sons & Co.* v. *Comptoir National,* [1894] 1 Q. B. 157 ; *Macbeth* v. *North and South Wales Bank,* [1908] A. C. 137.

CHAPTER VI.

TRESPASS TO THE PERSON.

ANY direct interference with the liberty or person of another, if it be either intentional or the result of negligence, is a trespass to the person. If one man wounds or imprisons another or strikes or attempts to strike him, the latter has *primâ facie* a good cause of action, even though he has sustained no physical injuries; he need not prove that the other intended to injure him or had any spite or malice against him. But if the defendant can show that the act complained of was the result neither of any negligence nor of any intentional trespass on his part, the plaintiff cannot recover.

Where one man receives physical injuries in consequence of some negligence on the part of another, but there is no immediate physical contact between the two and no direct application of force by one to the other, the action, if any, is one of negligence; such actions are dealt with in the next chapter.

"If the act that does an injury is an act of direct force, trespass is the proper remedy (if there is any remedy)."[1] The injury must be the immediate and not the consequential result of the defendant's act.[2] Thus, a man commits a trespass if he strikes or shoots another, or hits him with a stick, or rides over him, or drives any vehicle against him. But if he leaves a grating in the pavement unfastened, and a passer-by treads on it and is injured in consequence, the latter must sue for negligence, and not in trespass; for here the injury is not a necessary result of the defendant's neglect, and the damage is therefore consequential. But where the injury sustained, though consequent upon the defendant's conduct, was caused by forces over which he had no control, and was not the result of negligence, there is no wrongful act on his part and consequently no liability either in negligence or trespass.[1]

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[1] *Per* Bramwell, B., in *Holmes* v. *Mather* (1875), L. R. 10 Ex. at p. 268.

[2] *Leame* v. *Bray* (1803), 3 East, 593.

The defendant's horses, while being driven by his servant in the public highway, ran away and became so unmanageable that the servant could not stop them, but could to some extent guide them. The defendant, who sat beside his servant, was requested by him not to interfere with the driving and complied. While trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The plaintiff having sued the defendant for negligence and in trespass, the jury found that there was no negligence in any one. It was held that, even assuming the defendant to be as much responsible as his servant, no action was maintainable; for since the servant had done his best under the circumstances, the act of alleged trespass in giving the horses the direction towards the plaintiff was not a wrongful act.[2]

The defendant, who was one of a shooting party, fired at a pheasant. One of the pellets from his gun glanced off the bough of a tree and accidentally wounded the plaintiff, who was engaged in carrying cartridges and game for the party. The plaintiff framed his Statement of Claim in negligence. The jury found that there was no negligence on the part of the defendant, and it was clear from the facts that the injury was not intentional. It was, however, contended that, even in the absence both of intention and negligence, an action of trespass would lie, but Denman, J., overruled this contention and gave judgment for the defendant.[1]

Such trespass may be either an assault,[3] a battery,[3] an arrest, or an imprisonment.

(i.) *An action of assault.*—Any attempt to strike another made by one who is near enough to strike him is an assault, although no blow was actually received. So is any "threat of violence exhibiting an intention to assault, if coupled with a present ability to carry the threat into execution."[4] An assault, however, must be an act done against the will of the party assaulted.

"I own I have considerable doubt whether any mere threat not in the slightest degree executed, that is, a person saying to another, 'If you do not move, I shall use such and such force,' is an assault. My impression is that it is not. I do not know at what distance it is necessary for the party to be. No doubt, if you direct a weapon or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault."[1] "If a sword is flourished at such a distance that it would be impossible to hurt any person, it would not be an assault."[2]

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[1] *Stanley* v. *Powell*, [1891] 1 Q. B. 86.

[2] *Holmes* v. *Mather* (1875), L. R. 10 Ex. 261.

[3] We have already dealt at length with these offences, which are also crimes. See *ante*, pp. 316—325.

[4] *Per* Jervis, C. J., in *Read* v. *Coker* (1853), 13 C. B. at p. 860; and see *R.* v. *Duckworth*, [1892] 2 Q. B. 83.

(ii.) *An action of battery.*—A battery is the unlawful beating of another—the least touching of another's person wilfully or in anger.[3] Every man's person is sacred, and the law protects it from the least interference by another. Every battery, therefore, includes an assault.

As we have already seen, it will be a defence to any action of trespass to the person, if the defendant can show that the injury done to the plaintiff was the result neither of any negligence nor of any intentional trespass on his part. "If the circumstance, which is specially pleaded in an action of trespass, do not make the act complained of lawful and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental (*i.e.*, unintentional), but likewise that it was not owing to neglect or want of due caution."[4] Hence, if the injuries were caused by a pure accident, the plaintiff cannot recover.

If the defendant is absolutely free from all blame in the matter, and was endeavouring to do what was the best to be done under the circumstances when the collision occurred, no action will lie against him. "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."[5]

If an accident happens owing to the defendant driving his carriage at night on the wrong side of the road, this is evidence from which a jury may infer negligence, unless they be satisfied that the night was so dark that it was impossible to distinguish one side of the road from the other.[6]

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[1] *Per* Pollock, C. B., in *Cobbett* v. *Grey* (1850), 4 Exch. at p. 744.

[2] *Per* Pollock, C. B., in *Allsop* v. *Allsop* (1860), 29 L. J. Ex. at p. 316.

[3] See 3 Bla. Com. 120.

[4] Bacon's Abridgment, Trespass I., p. 706, cited with approval by Denman, J., in *Stanley* v. *Powell,* [1891] 1 Q. B. at p. 93.

[5] *Per* Bramwell, B., in *Holmes* v. *Mather* (1875), L. R. 10 Ex. at p. 267.

[6] *Leame* v. *Bray* (1803), 3 East, 593, as explained by Denman, J., in *Stanley* v. *Powell,* [1891] 1 Q. B. at p. 92.

Or the defendant may be able to show that it was by the consent of the plaintiff that he laid hands upon him.

Thus, no action for battery would lie for damages received in a boxing match or a game of football, unless the plaintiff could show that the defendant in causing the injury complained of had flagrantly violated the rules which governed the match or game, and under which the plaintiff had consented to take part in the contest.

Again, the defendant may be able to show circumstances which justify the battery of which the plaintiff complains. Thus it may be that the plaintiff first struck the defendant; the defendant would be entitled to defend himself from such attack, but not to continue his reprisals after the plaintiff has desisted, for to do so would be to assume the offensive. So in defence of goods or possessions a man may justify laying hands upon another, who wrongfully seeks to deprive him of them, provided he does not use more force than is necessary for the purpose; and so may his servant.[1] But a mere "apprehension of danger to either his goods or his person" will not be sufficient.[2] Again, a parent or master is justified in giving moderate correction to his child, his scholar or his apprentice. Other circumstances may justify an act which is *primâ facie* a battery, as where some person in authority is compelled to use some degree of force to maintain order or to prevent a breach of the peace.

Thus, the captain of a vessel is justified in committing an assault upon a passenger where such assault is necessary for the preservation and maintenance of good order and discipline on board.[3] Similarly a churchwarden or beadle may, in the exercise of his office, seize and turn out of church a man who is disturbing the congregation by improper behaviour during the performance of divine service, provided no unnecessary violence be employed.[4] A coroner has the power to order the expulsion of any one who in his opinion is hindering the proceedings of his Court.[5] So had a revising barrister.[6] But where a revising barrister in 1875 ordered the expulsion of a person who had in 1874 wilfully withheld material evidence in order to prevent his cousin establishing a claim as a freeholder, and who in 1875 produced the evidence in order to prevent him claiming as a leaseholder, it was held that the expulsion was wrongful; such conduct was not an interruption of the proceedings of the Court then being held in 1875.[1]

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[1] *Eastern Counties Ry. Co.* v. *Broom* (1851), 6 Exch. 314.

[2] *Per* Blackstone, J. (dissenting), in *Scott* v. *Shepherd* (1773), 1 Smith. L. C., 12th ed. at p. 517.

[3] *Noden* v. *Johnson* (1850), 16 Q. B. 218.

[4] *Burton* v. *Henson* (1842), 10 M. & W. 105; and see *Butler* v. *Manchester, &c., Ry. Co.* (1888), 21 Q. B. D. 207; *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142.

[5] *Garnett* v. *Ferrand* (1827), 6 B. & C. 611.

[6] County Voters Registration Act, 1865 (28 & 29 Vict. c. 36), s. 16.

Again, if one of the public, who has been invited to attend a public meeting, disturbs the proceedings and is requested to leave the room, he becomes a trespasser if he refuses to do so and may be gently expelled.[2]

Where any one "comes into a house and disturbs the peace of the family without actually committing any assault, the master of the house may turn him out, or call a policeman to do so."[3]

Railway companies are often authorised by their statutes to eject from a railway carriage any person who has broken one of their by-laws and refuses to pay the penalty demanded of him. But the by-law must be a reasonable one.[4]

It is also a statutory defence to a civil action for assault that the plaintiff summoned the defendant for the same assault before justices, who dismissed the complaint and gave the defendant a certificate to that effect; or that the defendant was convicted and paid the fine imposed, and received a certificate of conviction.[5]

(iii.) *Malicious Arrest.*—An action lies at common law against any man who puts the process of the law in motion against another maliciously and without reasonable and probable cause. The most familiar instance of the application of this principle is the action for malicious prosecution, which will be dealt with later on;[6] another instance is the action for malicious arrest, with which we must deal briefly here, as it involves a trespass to the person.[7]

If a debtor is about to leave the country, any creditor can apply to a judge for an order to arrest him under section 6 of 32 & 33 Vict. c. 62. To obtain this order he must satisfy the judge by evidence on oath that he has a good cause of action against the debtor to the amount of £50 or upwards, that there is probable cause for believing that the debtor is about to leave the country, and that his absence will materially prejudice the creditor. Any abuse of this power would be ground for an action for malicious arrest.[1] To succeed in such an action, therefore, the plaintiff must show some falsehood, fraud or misrepresentation of fact by the defendant in obtaining the original order.[2] But if the defendant stated the facts fairly and truly to the judge who granted the order, he will not be liable, even though the order be subsequently rescinded.[3] In other words, a mistake or an error of judgment on the part of the judge will not render liable a defendant in whom the plaintiff can show neither *suggestio falsi* nor *suppressio veri*.

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[1] *Willis* v. *Maclachlan* (1876), 1 Ex. D. 376.

[2] See the Public Meeting Act, 1908 (8 Edw. VII. c. 66).

[3] *Per* Lord Campbell, C. J., in *Shaw* v. *Chairitie* (1850), 3 Car. & K. at p. 25.

[4] *Chilton* v. *London and Croydon Ry. Co.* (1847), 16 M. & W. 212; *Eastern Counties Ry. Co.* v. *Broom* (1851), 6 Exch. 314.

[5] 16 Vict. c. 30, s. 1; 24 & 25 Vict. c. 100, ss. 42—46.

[6] See *post*, p. 546.

[7] As to the malicious arrest of a ship by Admiralty process, see *The Walter D. Wallet*, [1893] P. 202.

(iv.) *False Imprisonment.*—Every citizen enjoys the right of personal liberty; he is entitled to stay at home or walk abroad at his pleasure without interference or restraint from others. A violation of this right is a tort and actionable without proof of any special damage. Any confinement or detention for which no legal authority can be shown is a "false imprisonment." Hence in an action of false imprisonment a plaintiff has only to prove the detention of his person, and it is then for the defendant to justify his act by showing that the detention was lawful.

First, the plaintiff must prove an imprisonment. Any confinement, such as a forcible detention in a public street or a private room, is an imprisonment, but a merely partial restraint is not.[4] Thus, where two policemen prevented the plaintiff from going on, but left him free to go back or to stay where he was, it was held that there had been no imprisonment and that therefore no action lay.[5] It is not necessary, however, that there should be any actual physical restraint. If a man threatens or declares his intention to arrest or imprison another with a show of authority to which that other submits, this is an imprisonment, whether there was any lawful authority or not.

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[1] *Skinner* v. *Gunton and others* (1680), 1 Wms. Saund. 228 d; *Williams* v. *Smith* (1863), 14 C. B. N. S. 596.

[2] *Daniels* v. *Fielding* (1846), 16 M. & W. 200; *Ross* v. *Norman* (1850), 5 Exch. 359.

[3] *Farley* v. *Danks* (1855), 4 E. & B. 493; *The Quartz Hill, &c., Co.* v. *Eyre* (1883), 11 Q. B. D. 674.

[4] See *Burns* v. *Johnston*, [1917] 2 I. R. 137.

[5] *Bird* v. *Jones* (1845), 7 Q. B. 742; *Robinson* v. *Balmain New Ferry Co.*, [1910] A. C. 295.

Thus, the wrongful removal of a prisoner from one part of a prison to another and his detention there will be a good cause of action for trespass and false imprisonment, to which even the Home Secretary may be liable, if the plaintiff was removed under a general order issued by him for the classification of the prisoners, which he had no legal authority to make.[1] So, too, the retention of a prisoner for one day beyond his term of imprisonment would render the governor of the gaol liable.[2]

Again, where warders detained for inquiries a man who had been acquitted of a criminal charge at Quarter Sessions, it was held that this was a false imprisonment for which the governor of the prison was liable.[3]

As a false imprisonment is a trespass to the person, the plaintiff need not show that he has sustained any pecuniary loss through the action of the defendant. He is entitled to general damages for the interference with his liberty. But if he has in fact sustained any special damage, this should be expressly claimed in his pleading and must be strictly proved at the trial. And only such damage can be recovered as flows directly from the defendant's act.

Thus, it has been held that a plaintiff can recover damages for such indignities as being handcuffed, being washed and having his hair cut, but not for any violence or ill-treatment on the part of the police officers; for that would not be a necessary consequence of the defendant's act which brought about the plaintiff's imprisonment.[4] So a justice of the peace is not liable for the prolonged imprisonment caused by a remand.[5] But if after holding an inquest without jurisdiction a coroner issues a warrant against the plaintiff, he can, in a subsequent action against the coroner for false imprisonment, recover back as special damage the expense to which he had been put in getting the coroner's inquisition quashed.[6]

We now proceed to consider the defences open to a defendant in an action of false imprisonment:—

(a) The defendant is sometimes in a position to show that he held a warrant from a magistrate, authorising the arrest. No action will lie for the arrest complained of, if it was made in obedience to a warrant issued by a competent tribunal,[1] though an action for malicious prosecution may possibly lie against the person who improperly set that tribunal in motion.[2] But the Court that issued the warrant must have been competent to deal with the case, and the arrest must have been made in obedience to the warrant. "Whenever a warrant has been issued to arrest a person charged with an offence in respect of which he cannot be apprehended without a warrant, the police officer must have the warrant in his possession at the time when he executes it; if he has not, the arrest will be illegal."[3]

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[1] *Cobbett* v. *Grey* (1850), 4 Exch. 729.

[2] See *Migotti* v. *Colvill* (1879), 4 C. P. D. 233.

[3] *Mee* v. *Cruikshank* (1902), 86 L. T. 708.

[4] *Mason* v. *Barker* (1843), 1 Car. & K. 100.

[5] *Lock* v. *Ashton* (1848), 12 Q. B. 871.

[6] *Foxhall* v. *Barnett* (1853), 2 E. & B. 928.

The warrant of the Speaker of the House of Commons, when issued in a matter over which the House has jurisdiction, is to be construed on the same principle as a mandate or writ issuing out of a superior Court of common law, and it therefore affords a valid defence to an action for assault and false imprisonment brought against the Serjeant-at-Arms, who acted in obedience to it.[4]

Again, where Richard Hoye was arrested on a warrant issued by mistake against John Hoye, his father, it was held that he had a good cause of action, even though he was the person against whom the warrant was intended to have issued.[5] So, too, an arrest upon a warrant which turns out to be not properly backed is illegal.[6]

A person, who originates proceedings merely by stating his case to a Court of justice, is not liable for false imprisonment should the Court order an arrest, even though the proceedings leading to the arrest were erroneous and without jurisdiction;[7] neither is one who prefers a complaint to a magistrate and procures a warrant upon which the accused is taken into custody, when the magistrate had in fact no jurisdiction.[8]

A solicitor, however, by deliberately directing the execution of a bad warrant, may render himself liable for false imprisonment.[9] But this will not be so if he has merely set in motion a Court of competent jurisdiction on behalf of his client, even though that Court may on his motion have committed a trespass. Where, on the other hand, he admits his concurrence in the act complained of, he can only justify it by showing that he acted under a legal authority.[10]

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[1] *Davies* v. *Fletcher* (1853), 2 E. & B. 271.

[2] See *post*, p. 546, and *Austin* v. *Dowling* (1870), L. R. 5 C. P. 534.

[3] *Per* Mellor, J., in *Codd* v. *Cabe* (1876), 1 Ex. D., at p. 356.

[4] *Howard* v. *Gosset* (1845), 10 Q. B. 359; and see *R.* v. *Wilkes* (1763), 2 Wils. 151; *Wilkes* v. *Wood* (1763), 19 St. Tr. 1153; *Entick* v. *Carrington* (1765), 19 St. Tr. 1029; *Sayre* v. *Earl of Rochford* (1777), 20 St. Tr. 1285.

[5] *Hoye* v. *Bush* (1840), 1 M. & Gr. 775; and see *Grainger* v. *Hill* (1838), 4 Bing. N. C. 212.

[6] *R.* v. *Cumpton* (1880), 5 Q. B. D. 341.

[7] *Carratt* v. *Morley* (1841), 1 Q. B. 18; *Kelly* v. *Lawrence* (1864), 3 H. & C. 1.

[8] *Brown* v. *Chapman* (1848), 6 C. B. 365.

[9] *Green* v. *Elgie* (1843), 5 Q. B. 99; *Eggington* v. *Mayor of Lichfield* (1855), 5 E. & B. 100.

[10] *Bryant* v. *Clutton* (1836), 1 M. & W. 408.

(b) Where the arrest is made without a warrant, it may yet be justified by special circumstances, *e.g.*, by the relations existing between the parties. Take, first, the case where the defendant is a private person. He would be justified, if a father or guardian, in subjecting his child or ward to some forms of detention, provided such punishment did not go to the length of actual cruelty.[1] This would also be true of a schoolmaster or tutor, who stands *in loco parentis* to his pupil. A private person may also arrest any one for whom he has become bail, in order to secure his attendance at the time and place named in the bail bond.[2]

Again, the common law of England grants to private persons the power of arrest in certain circumstances for the preservation of the peace. Thus, a private person is justified in arresting any of the King's subjects if there be a breach of the peace actually continuing, or if he has reasonable ground to believe that a breach of the peace which has been committed will be renewed.[3] It is also clear that any bystander may and ought to interfere to part those who are breaking the peace, and to stay those who are going to join them. "Any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer."[4]

Thus, where a man stationed himself "opposite to another's house, making a disturbance, exciting others to disturbance and riot, and obstructing the public way," it was held that the householder was justified in giving him into custody, for his acts amounted to a breach of the peace.[5]

Again, a private person may justify breaking and entering the plaintiff's house and imprisoning his person in order to prevent him from murdering his wife.[6]

But a private individual who has seen an affray committed is not justified, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and when there is no danger of its renewal, in giving either of them in charge to a constable who had not seen the affray.[7] If, however, a constable has seen a breach of the peace committed, a private person may insist upon him doing his duty without incurring liability.[1]

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[1] See *R.* v. *Jackson,* [1891] 1 Q. B. 671.
[2] *Ex parte Lyne* (1822), 3 Stark. 132.
[3] *Price* v. *Seeley* (1843), 10 Cl. & F. 28.
[4] *Per* Parke, B., in *Timothy* v. *Simpson* (1835), 1 Cr. M. & R. at p. 762.
[5] *Per* Erle, J., in *Webster* v. *Watts* (1847), 11 Q. B. at p. 324.
[6] *Handcock* v. *Baker and others* (1800), 2 B. & P. 260.
[7] *Baynes* v. *Brewster* (1841), 2 Q. B. 375.

Again, any private person, who was present at the time when a felony was committed, may and ought to arrest or aid in arresting the offender. He may even break into a private house in order to prevent the commission of a felony. Where a felony has been committed, and there is reasonable and probable cause for believing that A. committed it, a private person will be justified in arresting A., even though it should eventually turn out that the felony was committed by B.[2] It will then be for a jury to say whether the facts alleged are proved, and for the judge to determine whether or not they amount to reasonable and probable cause for imprisoning the plaintiff. But if it appear at the trial that no felony was in fact committed, but only a misdemeanour or a tort, then he will be liable to an action; for in such cases a private person has no right to arrest any one on suspicion, however well grounded his suspicions may be.[3] But if he merely gives information to a police officer, upon which the latter decides to make an arrest, the former will not necessarily be liable in an action for false imprisonment, even though he had—after the arrest—signed the charge-sheet at the police station.[4]

Statute law has given further powers of arrest to a private individual in many cases. He may without any warrant arrest any one found offending against the Vagrancy Act, 1824,[5] the Official Secrets Act, 1911,[6] the Larceny Act, 1916,[7] or found committing an indictable offence during the night.[8] The owner of property on which suspicious persons are found, or to which malicious injury has been done, may arrest without warrant; his servants or agents have a similar power.[9] Again, a pawnbroker may apprehend any person endeavouring to pawn property which the pawnbroker reasonably suspects to have been stolen.[1] Failure to give any satisfactory account of the way in which the property was acquired would be a reason for such suspicion. And a railway servant may arrest a passenger who fails to produce a ticket or pay his fare, if he also refuses to give his name and address.[2] There is, too, statutory power to arrest any one making a disturbance in a church, chapel or churchyard.[3]

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[1] *Derecourt* v. *Corbishley* (1855), 5 E. & B. 188.

[2] *Allen* v. *Wright* (1838), 8 Car. & P. 522; *Broughton* v. *Jackson* (1852), 18 Q. B. 378.

[3] *Walters* v. *W. H. Smith & Son, Ltd.*, [1914] 1 K. B. 595.

[4] *Grinham* v. *Willey* (1859), 4 H. & N. 496; *Sewell* v. *National Telephone Co., Ltd.*, [1907] 1 K. B. 557.

[5] 5 Geo. IV. c. 83, s. 6.

[6] 1 & 2 Geo. V. c. 28, s. 6.

[7] 6 & 7 Geo. V. c. 50, s. 41.

[8] 14 & 15 Vict. c. 19, s. 11.

[9] 2 & 3 Vict. c. 47, s. 64, and 24 & 25 Vict. c. 97, s. 61.

(c) A police constable has all the powers of a private person; he has also special powers vested in him by virtue of his office. His liability with regard to arrest is, therefore, considerably less than that of a private person. He may without a warrant arrest any one for a breach of the peace committed in his sight.[4] So, too, he may make any arrest necessary to prevent a breach of the peace. And where upon probable suspicion or upon a reasonable charge made by a third person he believes that a felony has been committed, he may without a warrant arrest the person whom he believes to have committed such felony.[5] For that purpose he is authorised (as upon a justice's warrant) to break open doors; it is said that he may even kill the felon, if he cannot otherwise ensure his capture.[6] To render the arrest lawful, there must be reasonable ground for suspecting both that a felony had been committed and that the person arrested had committed it.[7] Where he is suspected of having committed a misdemeanour only, a police constable has not, as a general rule, the same immunity,[8] unless it is conferred upon him by special statute, such as the Protection of Animals Act, 1911, s. 12 (1),[9] or the Criminal Law Amendment Act, 1912, s. 1.[10] The fact that a constable knew that a warrant had been issued for the apprehension of the plaintiff has been held to be sufficient ground for reasonably suspecting that a felony had been committed.[1]

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[1] 35 & 36 Vict. c. 93, s. 34.

[2] 52 & 53 Vict. c. 57, s. 5.

[3] 23 & 24 Vict. c. 32, ss. 2, 3.

[4] *Griffin* v. *Coleman* (1859), 4 H. & N. 265; *R.* v. *Light* (1857), Dearsl. & B. 332.

[5] *Hogg* v. *Ward* (1858), 3 H. & N. 417.

[6] 4 Bla. Com. 292.

[7] *Beckwith* v. *Philby* (1827), 6 B. & C. 635, 638; *Hogg* v. *Ward*, *suprà.*

[8] *Mathews* v. *Biddulph* (1841), 4 Scott, N. R. 54; *Bowditch* v. *Balchin* (1850), 5 Exch. 378.

[9] 1 & 2 Geo. V. c. 27.

[10] 2 & 3 Geo. V. c. 20.

By statute it is his duty to arrest without a warrant all offenders whose names and residences cannot be obtained,[2] and all persons loitering in any place during the night, whom he suspects of having committed or being about to commit felony.[3] But where a particular statute authorises a constable to take into custody without a warrant any one offending against its provisions within his view, he must show that he actually saw the offence committed.[4]

With regard to arrests for misdemeanours, the police officer strictly ought to have the warrant with him at the time.[5] But in practice the arrest is often made on a warrant known to be in existence, which is read to the prisoner as soon as the officer in whose possession it is can be fetched. A man, however, cannot legally be arrested for a breach of a county council by-law or for refusing to give his name and address, unless such power is expressly conferred by statute.[6]

The warrant of a Court of competent authority will protect any ministerial officer employed in executing its process. Where a Court has jurisdiction over a cause before it and in disposing of it proceeds erroneously, the party who takes steps to enforce the judgment will not be liable to an action; nor will any officer or servant of the Court who executes process under it.[7] Where, however, the Court has no jurisdiction over the cause before it, the whole proceeding is bad, and any one who enforces the process of the Court therein will be liable to an action for false imprisonment;[8] for he is presumed to know the law and therefore to be cognisant of the want of jurisdiction. Protection is, however, extended to constables who have acted under magisterial warrants issued without jurisdiction, and in some other cases.[1]

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[1] *Creagh* v. *Gamble* (1888), 24 Ir. L. R. 458.

[2] 2 & 3 Vict. c. 47, s. 63.

[3] 24 & 25 Vict. c. 96, s. 104.

[4] *Bowditch* v. *Balchin, suprà*; *Trebeck* v. *Croudace*, [1918] 1 K. B. 158.

Codd v. *Cabe* (1876), 1 Ex. D. 352.

[6] See, for instance, s. 229 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120); and the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), s. 8.

[7] *Andrews* v. *Marris* (1841), 1 Q. B. 3; *Thomas* v. *Hudson* (1845), 14 M. & W. 353; *Cobbett* v. *Hudson* (1849), 13 Q. B. 497.

[8] *Carratt* v. *Morley* (1841), 1 Q. B. 18.

(d) A justice of the peace has a twofold power in relation to the arrest of felons. If he sees a felony or any breach of the peace being committed, he may, like any private individual, himself apprehend the felon; or he may command some one else to do so, and such a command is a good warrant without writing. But if the felony or other breach of the peace be committed in his absence, then he must issue his warrant in writing under his seal to apprehend the offender.

Where upon the complaint of another a justice of the peace acts judicially, using the discretionary power given him by statute, he will not be liable for a mere error of judgment;[2] and he is protected from liability in respect of "any act"—within his jurisdiction—"done by him in the execution of his duty as such justice," except where he is proved to have acted "maliciously and without reasonable and probable cause."[3]

Again, where the justice has acted in a matter within his jurisdiction, a conviction good upon the face of it will be a sufficient protection to him; for such conviction, so long as it remains in force, is conclusive evidence of the facts stated in it, and cannot be impugned or rebutted even by proof of corrupt motives or of malice.[4] "It is a general rule and principle of law that, where justices of the peace have an authority given to them by an Act of Parliament, and they appear to have acted within the jurisdiction so given and to have done all that they are required by the Act to do in order to originate their jurisdiction, a conviction drawn up in due form and remaining in force is a protection in any action brought against them for the act so done."[5]

But "for any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby may maintain an action against any such justice;"[1] and he need not allege or prove that the act complained of was done maliciously or without reasonable or probable cause.[2] No action, however, can be brought for anything done under a conviction or order, where the magistrate has no jurisdiction or has exceeded it, until the conviction or order has been quashed; nor for anything done under a warrant to compel an appearance, followed by a conviction or order, until it has been quashed; nor for anything done under such warrant not followed by a conviction or order, or under a warrant for an alleged indictable offence, if a summons had been previously served and not obeyed.

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[1] 24 Geo. II. c. 44, ss. 6 and 8.

[2] 11 & 12 Vict. c. 44, s. 4; and see *Linford* v. *Fitzroy* (1849), 13 Q. B. 240.

[3] *Ib.* s. 1; and see *Bott* v. *Ackroyd* (1859), 28 L. J. M. C. 207; *Sommerville* v. *Mirehouse* (1860), 1 B. & S. 652. A justice of the peace is not liable for words spoken by him on the bench, during the hearing of a case over which he had jurisdiction, even though it be alleged that the words were spoken falsely and maliciously and without reasonable cause: *Law* v. *Llewellyn*, [1906] 1 K. B. 487.

[4] *Brittain* v. *Kinnaird* (1819), 1 B. & B. 432.

[5] *Per* Abbott, C. J., in *Basten* v. *Carew* (1825), 3 B. & C. at pp. 652, 653.

The main distinction to be noted in regard to the remedy available against a magistrate who acts without jurisdiction, and that available against a magistrate who acts erroneously within his jurisdiction, is as follows:—"If the act of the magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of motive, and to establish this the act must be shown to be malicious."[3]

No action, however, can be brought against a justice of the peace for "any act done in pursuance or execution or intended execution" of his office, "unless commenced within six months next after the act, neglect or default complained of."[4]

(e) Lastly, it is possible that an action of false imprisonment may be brought against the judge of a Court of record. The judge of a superior Court can never be liable in an action of false imprisonment for an act done by him in his judicial capacity.[5] Nor can those who carry out orders given by him in that capacity. The judge of an inferior Court is similarly immune from liability, unless the plaintiff can show that he acted beyond his jurisdiction, that is, that he had not then before him any suit or matter in relation to which he had authority to imprison or arrest.[1] Even so he is not liable, unless it be proved by the plaintiff that he knew or had the means of knowing facts which would have shown him that he was exceeding his jurisdiction.[2] But he will be liable if he so exceeds through a mistake, not of fact, but of law.[3]

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[1] 11 & 12 Vict. c. 44, s. 2; and see *Leary* v. *Patrick* (1850), 15 Q. B. 266.

[2] *Pease* v. *Chaytor* (1861), 1 B. & S. 658.

[3] *Per* Erle, J., in *Taylor* v. *Nesfield* (1854), 3 E. & B. at p. 730. See also *Newbould* v. *Coltman* (1851), 6 Exch. 189; *Gelen* v. *Hall* (1857), 2 H. & N. 379.

[4] The Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1; and see *Haylock* v. *Sparke* (1853), 1 E. & B. 471; *Kirby* v. *Simpson* (1854), 10 Exch. 358; *Clayton* v. *Pontypridd U. D. C.*, [1918] 1 K. B. 219.

[5] *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.

(f) A defence of a very different character arises in cases where the action is not brought against the person who actually arrested the plaintiff, but against his master or employer. Here the question at once arises, is the master or employer liable for the tortious act of his servant? He will not be liable, unless he had given his servant authority, express or implied, so to act. And no such authority will be implied, unless the arrest was reasonably necessary for the protection of his master's property.[4] Further, a corporation cannot give its servants authority to do an act which it cannot legally do itself.[5]

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[1] *Doswell* v. *Impey* (1823), 1 B. & C. 169.

[2] *Pike* v. *Carter* (1825), 3 Bing. 78; *Calder* v. *Halkett* (1840), 3 Moo. P. C. C. 28.

[3] *Houlden* v. *Smith* (1850), 14 Q. B. 841.

[4] *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; *Hanson* v. *Waller*, [1901] 1 K. B. 390.

[5] *Goff* v. *G. N. Ry. Co.* (1861), 3 E. & E. 672; *Allen* v. *L. & S. W. Ry. Co.* 870), L. R. 6 Q. B. 65; *Ormiston* v. *G. W. Ry. Co.*, [1917] 1 K. B. 598.

CHAPTER VII.

NEGLIGENCE.

NEGLIGENCE is the breach of a duty to take care, and when it has caused damage to the plaintiff it is actionable.[1] "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."[2]

In order, then, to succeed in such an action, the plaintiff must prove three things—

(i.) that the defendant owed him a duty;

(ii.) that the defendant neglected to perform that duty or performed it negligently;

(iii.) that he has suffered damage in consequence of the defendant's neglect.

(i.) There need be no previous relationship between the plaintiff and the defendant. They may be entire strangers to one another. The plaintiff need not establish anything resembling what is called "privity" in the law of contract; but he must show that the defendant owed him a duty.[3] The duty may be owed either to him individually or to him as one of the public. The same act may be both a wrong to the public and a wrong to a private individual. But for the wrong to the public no private individual can sue, unless he has sustained some special damage particular to himself.

The fact that a contract exists between two persons does not prevent a duty arising, which, if violated, would be ground for an action of tort. But in most cases where such an action lies the duty is wholly independent of any contract. Thus, "two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company, which has contracted with one person to carry another, has no contract with the person carried, but has a duty towards that person."[1]

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[1] *Holmes* v. *Mather* (1875), L. R. 10 Ex. 261; *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314; *Caledonian Ry. Co.* v. *Mulholland*, [1898] A. C. 216.

[2] *Per* Brett, M. R., in *Heaven* v. *Pender* (1883), 11 Q. B. D. at p. 507; and see *Evans* v. *Manchester, &c., Ry. Co.* (1887), 36 Ch. D. 626.

[3] *Austin* v. *G. W. Ry. Co.* (1867), L. R. 2 Q. B. 442; *George* v. *Skivington* (1869), L. R. 5 Ex. 1; and *ante*, pp. 431, 432.

Again, the duty must be owed to the plaintiff, and not to a third person. A. cannot sue B. for the breach of a private duty which B. owed to C., even though A. has sustained damage in consequence of it.[2] C. alone can sue for the breach of a duty owed to himself, and he can only sue if damage has resulted to him from that breach.[3] It is therefore possible that a man may be very negligent and cause much damage, and yet no one will be able to sue him, if the only persons damaged are those to whom he owed no duty.

Thus, where A. employed a solicitor to draw a will for him and bade him insert a clause leaving a legacy of £1,000 to B., and the solicitor negligently omitted this clause from the will, it was held that B. had no cause of action; he had not employed the solicitor, and the solicitor therefore owed him no duty.[4]

So a telegraph company owes no duty to the addressee of a telegram.[5]

Again, where mortgagees lent money to a builder by instalments on the strength of the certificates of a surveyor, appointed by the builder's vendor, it was held that they had no cause of action against the surveyor when they were damnified owing to such certificates being negligently drawn up; for they had not appointed the surveyor, and consequently he owed no duty to them.[6]

So, where the plaintiff's sheep had strayed on to the defendants' railway and were there killed, the defendant company escaped liability, because the sheep did not stray on to the railway direct from the plaintiff's land. They were wrongfully on some one else's land, adjoining the railway, and thence had strayed on to the line. The statute 8 & 9 Vict. c. 20, s. 68, imposed, it was true, on the railway company a duty to make and maintain sufficient fences "for separating the land taken for the use of the railway from the adjoining lands not taken," and "for preventing the cattle of the owners and occupiers thereof from straying thereout," &c. This section of the Act, however, was held not to apply under the circumstances, inasmuch as the plaintiff was not the owner or occupier of the adjoining land.[1] If, however, any passenger on the railway had been injured through an accident caused by the presence of the sheep upon the company's line, he would have been entitled to recover damages; for although the statutory duty to fence is an obligation not as to passengers, but with regard to the owners and occupiers of adjoining lands, yet there is also a duty imposed by common law on a railway company to take every reasonable care to prevent danger to their passengers from animals coming on to the line.[2]

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[1] *Per* Brett, M. R., in *Heaven* v. *Pender* (1883), 11 Q. B. D. at p. 507.

[2] There are one or two exceptions to this general rule, which have been dealt with *ante*, p. 431.

[3] See *Earl* v. *Lubbock*, [1905] 1 K. B. 253.

[4] *Fish* v. *Kelly* (1864), 17 C. B. N. S. 194; *Hannaford* v. *Syms* (1898), 79 L. T. 30.

[5] *Playford* v. *U. K. Telegraph Co.* (1869), L. R. 4 Q. B. 706; *Dickson* v. *Reuter Telegraph Co.* (1877), 2 C. P. D. 62.

[6] *Le Lièvre* v. *Gould*, [1893] 1 Q. B. 491; and see *Robertson* v. *Fleming* (1861), 4 Macq. H. L. Cas. at p. 177.

The duty must clearly exist; it must not be inferred from other circumstances, where there was no intention on the part of the defendant to take upon himself such a duty.

Thus a landowner who dedicates a highway to the use of the public is under no duty to keep it in repair. So, too, land may be dedicated to the public as a highway, without any liability attaching for any risk or inconvenience to the public arising from its existing condition.[3]

But a mere licence to lodgers to use the roof of a house as a drying-place for linen does not impose any duty upon the landlord to repair the railing round the roof.[4] Nor is there any duty on the part of the occupier of premises to render them secure for persons using them without invitation for their own gratification.[5] But where the owner of a building lets it as chambers or offices to different tenants, but retains the staircase in his possession, he is under a duty towards persons using the staircase, when on business with the tenants, to keep it in a reasonably safe condition.[6]

Again, "one who chooses to become a guest cannot complain of the insufficiency of the accommodation afforded him" by his host, so long as there is nothing in the nature of a trap or concealed danger.[7] But where a barber, in shaving the plaintiff, negligently used razors and other appliances in a dirty and insanitary condition and the plaintiff contracted ringworm in consequence, he recovered damages.[8]

(ii.) Next, the plaintiff must show that the defendant has been guilty of negligence—that he either wholly omitted to perform his duty or that he was negligent in his performance of it. What amounts to negligence must depend on the facts of each particular case. "There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place or person."[1] "The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply the neglect of some care which we are bound by law to exercise towards somebody."[2]

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[1] *Ricketts* v. *The East and West India Docks, &c., Ry. Co.* (1852), 12 C. B. 160; *Sharrod* v. *L. & N. W. Ry. Co.* (1849), 4 Exch. 580. As to obligation to maintain gates at level crossing, see *Charman* v. *S. E. Ry. Co.* (1888), 21 Q. B. D. 524.

[2] *Buxton* v. *N. E. Ry. Co.* (1868), L. R. 3 Q. B. 549.

[3] *Fisher* v. *Prowse* (1862), 2 B. & S. 770; *Morant* v. *Chamberlin* (1861), 6 H. & N. 541; *Brackley* v. *Midland Ry. Co.* (1916), 85 L. J. K. B. 1596.

[4] *Ivay* v. *Hedges* (1882), 9 Q. B. D. 80; *Batchelor* v. *Fortescue* (1883), 11 Q. B. D. 474.

[5] *Jewson* v. *Gatti* (1885), 1 C. & E. 564.

[6] See *Huggett* v. *Miers*, [1908] 2 K. B. 278; *Ching* v. *Surrey C. C.*, [1910] 1 K. B. 736; *Lucy* v. *Bawden*, [1914] 2 K. B. 318.

[7] *Per* Williams, J., in *Corby* v. *Hill* (1858), 4 C. B. N. S. at p. 565; and see *Kimber* v. *Gas Light and Coke Co.*, [1918] 1 K. B. 439.

[8] *Hales* v. *Kerr*, [1908] 2 K. B. 601.

Though the defendant's act be not in itself unlawful, he may nevertheless be liable in damages, if he does it negligently or in an unlawful manner. But he cannot be charged with negligence if he took all reasonable care to prevent any damage being caused to others by his doing that lawful act.

The Legislature constantly, in the interests of the public, authorises acts to be done which occasion loss or damage to an individual. No action of tort will lie for such loss or damage, if the acts which are thus legalised have been performed with proper care. "When the Legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if damage results from the use of such thing, independently of negligence, the party using it is not responsible. It is consistent with policy and justice that it should be so."[3] But if these statutory powers be exceeded[4] or be exercised negligently and damage ensue, an action will lie; for the Legislature does not authorise negligence.[5]

Want of skill is not negligence. If a man is engaged to write a book or paint a picture, and he devotes to the task untiring industry and scrupulous care, and yet the result of his labours is a failure through lack of mental ability or manual skill, no action will lie. The person engaging him should have been careful to select a competent man. But the case is otherwise where any one holds himself out as possessing the special skill and training necessary to the exercise of a particular profession.

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[1] *Per* Bramwell, B., in *Degg* v. *Midland Ry. Co.* (1857), 1 H. & N. at p. 781.

[2] *Per* Bowen, L. J., in *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. at p. 694.

[3] *Per* Cockburn, C. J., in *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N. at p. 685; and see *Smith* v. *L. & S. W. Ry. Co.* (1870), L. R. 6 C. P. 14; *Powell* v. *Fall* (1880), 5 Q. B. D. 597.

[4] *Jones* v. *Festiniog Ry. Co.* (1868), L. R. 3 Q. B. 733; *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14.

[5] See *Hill* v. *Metropolitan Asylum District Board* (1879), 4 Q. B. D. 441; (1881) 6 App. Cas. 193; and *Sadler* v. *Staffordshire, &c., Tramways Co.* (1889), 22 Q. B. D. 17.

Thus, if A. sets up as a medical man and invites practice, *e.g.*, by placing a brass plate on his door, he will be deemed to warrant that he has undergone the training and has the skill and experience requisite in a medical man; if he has not these, he may be liable to a patient who has suffered in consequence, even though he treated him with the utmost care and diligence. A surgeon, for instance, does not undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill; but he does undertake to bring a fair, reasonable and competent degree of skill to the treatment of his patient; and it will be for the jury to say whether the injury complained of really was occasioned by the want of such skill in the defendant. Where, on the other hand, a medical man treats a patient with due care and skill, but in a special or unusual manner out of curiosity or by way of experiment, he may be liable for the consequences in the same way as if he had been negligent in the use of ordinary remedies.[1]

Negligence may be proved in an infinite variety of ways. "The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether from those facts, when submitted to them, negligence ought to be inferred."[2] The burden of proving negligence lies on the plaintiff, unless the facts speak for themselves. If the facts of the case show clearly that there must have been negligence, the plaintiff is released from the burden of proving it.

Thus, where the plaintiff was walking past the defendant's shop in the public street, and a barrel of flour fell from the window above the shop and seriously injured him, it was held that the occurrence itself was sufficient evidence of negligence, and cast upon the defendant the burden of proving that the accident was not attributable to any negligence on his part.[3] *Res ipsa loquitur.*

Any one who employs another to do an unlawful act is liable for any damage caused by that act. It is no defence that an action will also lie against the person who actually did the unlawful act.

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[1] *Dr. Groenvelt's Case* (1697), 1 Lord Raym. 213.

[2] *Per* Lord Cairns, L. C., in *Metropolitan Ry. Co.* v. *Jackson* (1877), 3 App. Cas. at p. 197; and see *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; *Turner* v. *Coates*, [1917] 1 K. B. 670; *Cole* v. *De Trafford* (*No.* 2), [1918] 2 K. B. 523.

[3] *Byrne* v. *Boadle* (1863), 2 H. & C. 722.

Thus in the case of *Ellis* v. *The Sheffield Gas Consumers' Co.*[1] the defendant company, although they had obtained no special powers for the purpose, arranged with contractors for the laying of their pipes in the streets of Sheffield. Whilst the contractors' men were making the necessary excavations, a heap of stones was left in one of the streets and over this the plaintiff, who was passing in the dark, fell and injured himself. The plaintiff sued the company, not the contractors; and it was held that he was right in so doing because, as Lord Campbell, C. J., observed,[2] this "is simply the case of persons employing another to do an unlawful act, and a damage to the plaintiff from the doing of such unlawful act. We have the *injuria et damnum*, which constitute a ground of action."

A master is liable for damage resulting to the plaintiff from the negligent act of his servant. "The party employing has the selection of the party employed, and it is reasonable that he, who has chosen an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the latter's want of skill or want of care."[3]

This rule applies to all servants whom the master employs to do any work or conduct any business, even though such servants are not selected or appointed by the master himself, but by some manager or foreman to whom the master has delegated the duty of selecting and appointing them; nor is it necessary that such work or business be carried on under the immediate control or superintendence of the master. On the same principle a railway company or any other incorporated body is liable for damage caused by the negligence or misconduct of its officers or servants.[4]

Thus, where the owner of a carriage had hired from a stable-keeper a pair of horses and a driver for the day, it was held, in the absence of any contract between the owner of the carriage and the driver, that no liability attached to the former for an injury caused by the negligence of the latter. "For the acts of a man's own domestic servants there is no doubt but the law makes him responsible; and if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him."[1] But in this case it was the stable-keeper, and not the owner of the carriage, who had selected the driver and was therefore answerable for any negligence on his part.

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[1] (1853), 2 E. & B. 767; and see *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. & N. 488; *Black* v. *Christchurch Finance Co.*, [1894] A. C. 48; *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335.

[2] 23 L. J. Q. B. at p. 43.

[3] *Per cur.* in *Reedie* v. *L. & N. W. Ry. Co.* (1849), 4 Exch. at p. 255; and see *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. H. L. Cas. at pp. 282, 284.

[4] *Bayley* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1873), L. R. 8 C. P. 148; *Tozeland* v. *West Ham Union*, [1906] 1 K. B. 538; *Ormiston* v. *G. W. Ry. Co.*, [1917] 1 K. B. 598.

"That person is undoubtedly liable who stood in the relation of master to the wrong-doer—he who had selected him as his servant from the knowledge or belief in his skill and care—and who could remove him for misconduct and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist."[2]

In order, however, to make the employer liable, the act complained of must have been an act fairly within the scope of the servant's duty and employment.[3] If the injury in question was committed by the defendant's servant wilfully, whilst not engaged in the master's service and whilst not acting within the scope of his authority,[4] no remedy can be had against the master.

Thus, if a servant, who is authorised merely to distrain cattle damage feasant, drives them from the highway into his master's close and there distrains them; or where he wantonly and in order to effect some purpose of his own strikes the plaintiff's horses and thereby causes an accident, the servant only will be liable.[5] But if the servant, whilst on his master's business,[6] is guilty of negligence which results in an injury to the plaintiff, the master will be liable; this may be so, although the servant, when driving his master's carriage, may at the time be going out of the direct road for some purpose of his own.[7] "No doubt a master may be liable for injury done by his servant's negligence, where the servant being about his master's business makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him," but "at all events if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance."[1] No liability attaches to the master if the servant, without his leave or knowledge, takes out his carriage and causes injury, because in this case the master has not entrusted the servant with the carriage or commissioned him to perform any service.

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[1] *Per cur.* in *Laugher* v. *Pointer* (1826), 5 B. & C. at p. 554.
[2] *Per cur.* in *Quarman* v. *Burnett* (1840), 6 M. & W. 499.
[3] Cf. *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516; *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240; *Janvier* v. *Sweeney and Barker* (1919), 35 Times L. R. 360.
[4] See *Edwards* v. *L. & N. W. Ry. Co.* (1870), L. R. 5 C. P. 445; *Storey* v. *Ashton* (1869), L. R. 4 Q. B. 476; *M'Namara* v. *Brown*, [1918] 2 I. R. 215.
[5] See *Freeman* v. *Rosher* (1849), 13 Q. B. 780, 785.
[6] See *Limpus* v. *General Omnibus Co.* (1862), 1 H. & C. 526.
[7] *Joel* v. *Morison* (1834), 6 Car. & P. 501.

Again, a waterworks company was held not answerable for an assault committed by its broker while executing a warrant of distress, on the ground that it was no part of his duty to commit an assault, his duty being simply to levy the rate due to the company.[2] But where the plaintiff sued a railway company because one of its servants had driven an engine into his sheep and so destroyed them, it was held that the action lay, because engine-driving was clearly within the scope of the servant's duty.[3]

Where a fire, which had arisen on the defendant's premises under circumstances in which neither he nor his servant was to blame, spread and caused injury to the plaintiff's property owing to the subsequent negligence of the defendant's servants, he was held liable.[4]

The fact that the master had at one time given his servants general directions not to do the very thing which caused injury to the plaintiff will not relieve him from liability, if such directions had, for some time before the accident, been habitually disregarded by his servants to the knowledge of his manager on the works.[5]

But the rule obviously does not apply to any case in which the party sought to be charged is not the master or employer of the party whose negligent act caused the damage. Hence, where the person who does the negligent act exercises an independent employment, or is the servant of a person who exercises an independent employment, a third person with whom he or his master has contracted to do certain work cannot be made liable for the negligent act. For such third person is an independent contracting party. "The sub-contractor, and not the person with whom he contracts, is liable civilly as well as criminally for any wrong done by himself or his servants in the execution of the work contracted for."[1]

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[1] *Per* Jervis, C. J., in *Mitchell* v. *Crassweller* (1853), 13 C. B. at p. 245; and see *Venables* v. *Smith* (1877), 2 Q. B. D. 279; *King* v. *London Cab Co.* (1889), 23 Q. B. D. 281.

[2] *Richards* v. *West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660.

[3] *Sharrod* v. *L. & N. W. Ry. Co.* (1849), 4 Exch. 580.

[4] *Musgrove* v. *Pandelis*, [1919] 2 K. B. 43.

[5] *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219; cf. *R.* v. *Stephens* (1866), L. R. 1 Q. B. 702, *ante*, p. 242; *Joseph Rand, Ltd.* v. *Craig*, [1919] 1 Ch. 1.

A railway company employed a contractor to build a bridge to carry the railway over a public road. In the course of building the bridge the servants of the contractor negligently let fall a large stone, which struck and killed a man using the road below. It was held that his widow had no cause of action against the railway company and that her remedy was against the contractor, although by the express terms of the contract the railway company had power to remove any of the contractor's workmen whom it deemed incompetent; for it was still the contractor who selected and employed the workmen.[2]

Again, where a builder had contracted to make certain alterations in a club-house, he was held not liable for the negligence of a servant of the gas-fitter whom he employed.[3] But where a servant is injured in consequence of the negligence of a man who had contracted with the servant's master to do some repairs, he can recover damages, although there was no privity of contract between him and the party by whose breach of duty the injury was caused.[4]

If the owner of a carriage hires horses of a stable-keeper, who provides a driver through whose negligence an injury is done, the driver must in general be considered as the servant of the stable-keeper or jobmaster. But if there be special circumstances in the case which go to show an assent, either express or implied, to the tortious act complained of by the party hiring the horses, or to show that he had control over the servant whose act caused the damage, he—and not the servant's master—will no doubt be liable for the consequences.[5]

The same principle applies where the carriage and horses are borrowed for the day,[6] though a person hiring or borrowing a carriage, and providing horses and servants, would be liable.[7] So, where the lessee of a ferry hired of the defendant for the day a steamer and a crew to convey his passengers across, the defendant was held liable for damage caused to a passenger by the negligence of the crew.[8]

(iii.) Lastly, the plaintiff must show that he has suffered damage which is the direct result of the defendant's negligence. "Negligence alone without damage does not create a cause of action."[1] But damage affords no ground of action unless it be the direct result of some unlawful act or neglect of duty on the part of the defendant.

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[1] *Per* Maule, J., in *Overton* v. *Freeman* (1852), 11 C. B. at p. 873; and see *R.* v. *Williams* (1884), 9 App. Cas. 418; *Donovan* v. *Laing Wharton Construction Syndicate*, [1893] 1 Q. B. 629; *Kimber* v. *Gas Light and Coke Co.*, [1918] 1 K. B. 439.

[2] *Reedie* v. *L. & N. W. Ry. Co.* (1849), 4 Exch. 244; and see *Gayford* v. *Nicholls* (1854), 9 Exch. 702.

[3] *Rapson* v. *Cubitt* (1842), 9 M. & W. 710.

[4] *Parry* v. *Smith* (1879), 4 C. P. D. 325; and see *Percival* v. *Hughes* (1883), 8 App. Cas. 447.

[5] *Jones* v. *Scullard*, [1898] 2 Q. B. 565.

[6] As to the liability of a proprietor of hackney carriages plying for hire within the metropolis, see *King* v. *London Cab Co.* (1889), 23 Q. B. D. 281. The fact that a man allows a carriage to go out with his name upon it is only *primâ facie* evidence of his liability for the negligence of any person driving it: *Smith* v. *Bailey*, [1891] 2 Q. B. 403.

[7] *Croft* v. *Alison* (1833), 4 B. & Ald. 590.

[8] *Dalyell* v. *Tyrer* (1858), E. B. & E. 899; and see *Schuster* v. *McKellar* (1857), 7 E. & B. 704.

The defendant's negligence must be the direct cause of the damage which the plaintiff has sustained. It need not be the sole cause; other things may be contributing causes, but it must be the main cause.[2] Where the damage which the plaintiff has sustained was the immediate result of some act by an innocent third person, the defendant will nevertheless be liable for the damage if he caused the innocent third person so to act,[3] or if his action was such that it should have been anticipated and guarded against by the defendant.[4]

It is not necessary that there should be any physical impact. Where the defendants' servant negligently drove a pair-horse van into the bar-room of a public-house, in which the plaintiff (who was pregnant) then was, it was held that she could recover damages for the physical injury and pain suffered by reason of premature confinement caused by the fright and consequent nervous shock, although neither the horse nor the van had actually struck her.[5]

At common law there was never any civil remedy for a personal injury causing death; *actio personalis moritur cum personâ*. Hence, where a servant was injured through the negligence of the defendant, but was not killed, he could himself maintain an action, or his master could sue for the temporary loss of his services. But where the servant was killed, neither his family nor his master had any right of action against the defendant, however negligent the latter might have been. Lord Campbell's Fatal Accidents Act, 1846,[6] was the first attempt to remedy this cruel anomaly. It gave the deceased's legal personal representative on behalf of his family the same rights of action as he himself would have had if he had lived.

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[1] *Per* Watson, B., in *Duckworth* v. *Johnson* (1859), 4 H. & N. at p. 659; and see *Cole* v. *Christie, Manson and Woods* (1910), 26 Times L. R. 469.

[2] See *post*, pp. 1282, 1283.

[3] *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892; *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; *ante*, p. 416.

[4] *Crane* v. *South Suburban Gas Co.*, [1916] 1 K. B. 33; *Ruoff* v. *Long & Co.*, *ib.* 148.

[5] *Dulieu* v. *White & Sons*, [1901] 2 K. B. 669.

[6] 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95.

The wife, husband, parent and child are entitled to share in the damages awarded in the manner indicated by the jury.[1] If there be no legal personal representative, or if he will not take action, any one of these beneficiaries can sue on behalf of himself and the others.

In such an action the plaintiffs must prove that the defendant was guilty of some wrongful act, neglect or default which caused the death, and that the death has caused pecuniary loss to the plaintiffs arising from their relationship with the deceased, not from any contract with him. Such damage is of the essence of the action. Some appreciable pecuniary loss must be shown to satisfy the provisions of the Act.[2] No solatium will be awarded either for the pain and suffering of the deceased or for the affliction of his relatives.[3] The plaintiffs must prove that they had a reasonable expectation of pecuniary benefit, had the deceased remained alive.[4]

Thus a father cannot recover, either at common law or under Lord Campbell's Act, the funeral expenses to which he has been put in burying an unmarried infant daughter, whose death was caused by the defendant's negligence, and who was residing with her father at the time of her death.[5]

But in assessing damages in any action under this Act "there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance."[6]

Defences.

As soon as the plaintiff has thus established a *primâ facie* case, it is incumbent on the defendant to bring forward his defence. The defences most frequently raised to an action of negligence are—

(i.) Accident.
(ii.) *Vis major.*
(iii.) Contributory negligence.

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[1] But see *Dickinson* v. *N. E. Ry. Co.* (1863), 2 H. & C. 735; *Wood* v. *Gray & Sons*, [1892] A. C. 576; *Stimpson* v. *Wood* (1888), 36 W. R. 734.

[2] *Duckworth* v. *Johnson* (1859), 4 H. & N. 653.

[3] *Blake* v. *Midland Ry. Co.* (1852), 18 Q. B. 93.

[4] *Hetherington* v. *N. E. Ry. Co.* (1882), 9 Q. B. D. 160.

[5] *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88; approved in *Clark* v *London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648.

[6] Fatal Accidents (Damages) Act, 1908 (8 Edw. VII. c. 7), s. 1.

The fact that the defendant had no desire or intention to injure the plaintiff affords no defence to an action brought for bodily injury caused by negligence or want of skill, although the jury will, no doubt, take this fact into consideration in determining the amount of damages to be awarded.

(i.) No man will be held responsible for an accident which was in no way his fault or the fault of some one for whose negligence he would be responsible, except under some express statutory provision.[1] The defendant may, therefore, set up as his defence that the occurrence complained of was an inevitable accident and in no way due to any negligence on his part.[2] Reasonable care is not shown when, after notice of danger at a particular spot, no inquiry is made as to its existence and extent and no warning is given.[3]

(ii.) Another defence is that the injury was not due to any negligence on the part of the defendant, but was brought about by the action of forces over which he had no control, and which it was impossible for him to foresee or overcome.[4] "The ordinary rule is that when the law creates a duty and the party is disabled from performing it without any default of his own by the act of God or the King's enemies, the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity." [5]

Thus, where damage was done to a pier through the violence of the wind and waves by a vessel whose master and crew had been compelled to leave her, the owners of the vessel were held not liable. This case had to be decided by reference to the common law liability, which was held not to have been extended by the Legislature. "If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is the duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has, by the act of God, become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for it, whether brought about by the act of man or by the act of God. There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute ordered to do, namely, to be liable for the damages."[1]

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[1] *Holmes* v. *Mather* (1875), L. R. 10 Ex. 261; *Stanley* v. *Powell*, [1891] 1 Q. B. 86; and see the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58).

[2] *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N. 679.

[3] *R.* v. *Williams* (1884), 9 App. Cas. 418; but see *Hudson* v. *Bray*, [1917] 1 K. B. 520, and *Morrison* v. *Sheffield Corporation*, [1917] 2 K. B. 866.

[4] *Box* v. *Jubb* (1879), 4 Ex. D. 76.

[5] *Per cur.* in *Nichols* v. *Marsland* (1876), 2 Ex. D. at p. 4.

(iii.) In both the above defences the defendant, as he always may, wholly denies that there was any negligence on his part. Sometimes, however, he is driven to admit that he was guilty of some negligence, which may have been one of the causes conducing to the plaintiff's injury. But at the same time he asserts that the plaintiff was himself negligent, and that it was this negligence on the part of the plaintiff, and not his own, that was the real cause of the injury for which the plaintiff now seeks to recover damages from him. This is called the defence of contributory negligence. But the negligence relied on as contributory must be the negligence of the plaintiff himself or of those who are really his servants or agents, acting within the scope of their employment;[2] and it must be the proximate and decisive cause of the injury which he has received. "Although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong;"[3] he has, therefore, no right of action.[4]

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[1] *Per* Lord Cairns, L. C., in *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. at p. 750.

[2] It was formerly held that a plaintiff, who was guilty of no negligence himself, could not recover damages from a negligent defendant, if there was any contributory negligence on the part of a person with whom the plaintiff was identified, *e.g.*, the engine-driver of the train, or the driver or conductor of the omnibus, in which the plaintiff was seated at the time of the collision. But this doctrine is now exploded: *The Bernina* (1887), 12 P. D. 36; affirmed (as *Mills* v. *Armstrong*) 13 App. Cas. 1; and see *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219.

[3] *Per* Parke, B., in *Bridge* v. *Grand Junction Ry. Co.* (1838), 3 M. & W. at p. 248.

[4] *Tuff* v. *Warman* (1857), 2 C. B. N. S. 740; 5 *Ib.* 573; *Davey* v. *L. & S. W. Ry. Co.* (1883), 12 Q. B. D. 70. As to the *onus* of proof in such cases, see *Wakelin* v. *L. & S. W. Ry. Co.* (1886), 12 App. Cas. 41, applied in *Pomfret* v. *L. & Y. Ry. Co.*, [1903] 2 K. B. 718. As to Admiralty rule, see *Cayzer* v. *Carron Co.* (1884), 9 App. Cas. 873.

Thus, where the plaintiff turned his donkey out in the public highway with its forefeet fettered and the defendant, driving downhill at "a smartish pace," ran over and killed it, it was held that the plaintiff could recover damages for his loss, despite his illegal act in turning the donkey out in the highway, because the jury found that the driver could by the exercise of ordinary care have avoided the donkey altogether.[1]

The same principles were applied in *Butterfield* v. *Forrester*,[2] where the plaintiff recklessly rode against a pole, which the defendant had wrongfully placed across a portion of the highway.

"Every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct;"[3] and the question whether or not the plaintiff contributed to the mischief that happened by his want of ordinary caution is necessarily one of degree, which must be answered by reference to the facts adduced in evidence.

Thus, where the plaintiff voluntarily incurred danger so great that no sensible man would have incurred it, it was held that he could not sue for compensation for injuries sustained.[4] If the plaintiff voluntarily places himself in a position relatively to the defendant which he has no lawful title to occupy or if, being cognisant of danger, he voluntarily exposes himself to it, he may be estopped by such conduct from insisting that the defendant's negligence had produced danger to himself.[5]

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[1] *Davies* v. *Mann* (1842), 10 M. & W. 546.

[2] (1809), 11 East, 60.

[3] *Per* Pollock, C. B., in *Rigby* v. *Hewitt* (1850), 5 Exch. at p. 243.

[4] *Clayards* v. *Dethick* (1848), 12 Q. B. 439, 446; and see the remarks of Bramwell, L. J., on this case in *Lax* v. *Corporation of Darlington* (1879), 5 Ex. D. at p. 35.

[5] As to the defence of common employment, see Master and Servant, *post*, pp. 867, 868.

CHAPTER VIII.

NUISANCE.

ANY act which, without any direct physical interference, materially impairs the use and enjoyment by another of his property, or prejudicially affects his health, comfort or convenience, is a nuisance. If a nuisance affects the property or tends to endanger the health, comfort or convenience of the general public or of all persons who happen to come within its operation, it is a public nuisance. If it prejudicially affects only one or two persons, it is a private nuisance.

For a public nuisance there are three remedies :—

(i.) By indictment at Assizes or Quarter Sessions. This is the appropriate remedy where several persons are affected by the nuisance in the same manner, though not perhaps to the same extent.

(ii.) The Attorney-General, acting on behalf of the public —either of his own motion or at the instigation of some person aggrieved—may apply for an injunction to restrain the continuance of the nuisance.

(iii.) Any private person, who has in consequence of the nuisance sustained any special damage of a particular kind over and above that suffered by the rest of the public, may bring an action to recover compensation for such damage. Here the particular loss is the cause of action.[1]

For a private nuisance there are two remedies :—

(i.) The person aggrieved may enter on the defendant's land and himself abate the nuisance, if he can do so peaceably ; or

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[1] See the judgment of Bowen, L. J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. at pp. 528, 529.

(ii.) He can bring an action for damages for nuisance, and for an injunction to restrain its continuance.

PRIVATE RIGHTS ARISING OUT OF PUBLIC NUISANCES.

We have already explained the nature of public nuisance, when dealing with the criminal law.[1] We propose here to discuss the right of a private individual to bring an action to recover compensation for the special damage which he has sustained from a public nuisance. If at the trial of such an action the judge thinks that the Attorney-General ought to have been made a party to the action as representing the public, he will generally on payment of costs allow the action to stand over to enable him to be added as a co-plaintiff.

To succeed in such an action the plaintiff must prove—

(i.) that the defendant committed a public nuisance; and

(ii.) that the plaintiff has in consequence suffered particular damage over and above that sustained by the rest of the community.

Private rights of action may arise, for instance, out of a public nuisance to a highway,[2] if the plaintiff has suffered some particular damage.[3]

The person who dedicates a highway to the use of the public is not liable, if an injury is caused to any one using the highway by an obstruction in the highway which existed at the time of dedication (such as projecting steps or trees), or by an excavation in or near the highway.[4] But he cannot subsequently do anything which will render the way less commodious to the public. If he or any one else subsequently makes and leaves unfenced an excavation so near a highway that the passers-by may without negligence stray into it, such an excavation is a public nuisance, and any one who does fall into it will have a good cause of action.[5]

If a house adjoining a highway be allowed to become ruinous and likely to fall, it is a nuisance to the highway.[6] A low wall with spikes on it immediately abutting upon a public highway may be such a nuisance.[7]

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[1] See *ante*, p. 239.

[2] A navigable river is a public highway as far inland as the flow of the tide extends.

[3] *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Campbell* v. *Paddington Corp.* [1911] 1 K. B. 869.

[4] *Fisher* v. *Prowse* (1862), 2 B. & S. 770.

[5] *Barnes* v. *Ward* (1850), 9 C. B. 392.

[6] *R.* v. *Watts* (1704), 1 Salk. 357.

[7] *Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199.

The owner of a piece of waste land separated from the highway by a rotten wooden fence belonging to him was held liable for injuries caused to a boy who climbed on to the fence. The Court held that the fence in its ruinous condition constituted a danger to those lawfully using the highway, and therefore amounted to a nuisance, and that this nuisance was the cause of the injury sustained by the boy.[1]

So, too, it is the duty of any one who diverts a highway under statutory powers to take proper precautions, by fencing or otherwise, to protect passengers from injury through their inadvertently continuing to use the former track.[2]

Again, any one who uses any part of a highway in an unusual and unreasonable manner, or in a way that is not necessary in order to enable him to enjoy his right of using the highway,[3] and thereby causes special damage to another, is liable to an action at the suit of that other.

Thus if a man leaves a steam plough or a roller or a heap of refuse on a strip of grass which is part of a highway, and thereby frightens the plaintiff's horse and causes him injury, he will be liable in damages.[4] So, if a man repeatedly causes large crowds to assemble on a portion of a highway, and thus obstructs the access to adjoining premises.[5] So is a tramway company which sprinkles salt on the snow.[6] And if a water company under its statutory powers places in a highway an apparatus which remains under its control, it is liable for injuries caused by neglect to keep it in repair.[7] A mis-firing motor cycle, which frightens horses on a public highway, is a public nuisance ; [8] but a skidding motor bus is not.[9]

So, too, where a railway company employed a contractor to build a bridge to carry the railway over a public road, and the contractor's servants negligently let fall a large stone, which struck and killed a man using the road below, it was held that his widow had no right of action against the railway company, but could recover damages from the contractor ; for he had been guilty of a public nuisance to a highway, and she had suffered loss and damage over and above that sustained by the rest of the community.[1]

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[1] *Harrold* v. *Watney*, [1898] 2 Q. B. 320 ; and see *Cooke* v. *Midland Great Western Ry. of Ireland*, [1909] A. C. 229 ; *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, and *ante*, p. 428.

[2] *Hurst* v. *Taylor* (1885), 14 Q. B. D. 918.

[3] *Chichester* v. *Foster*, [1906] 1 K. B. 167 ; *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K B. 370.

[4] *Harris* v. *Mobbs* (1878), 3 Ex. D. 268 ; *Wilkins* v. *Day* (1883), 12 Q. B. D. 110 ; *Brown* v. *Eastern and Midlands Ry. Co.* (1889), 22 Q. B. D. 391 ; *Jeffrey* v. *St. Pancras Vestry* (1894), 63 L. J. Q. B. 618 ; but see *Higgins* v. *Searle* (1909), 100 L. T. 280.

[5] *Barber* v. *Penley*, [1893] 2 Ch. 447.

[6] *Ogston* v. *Aberdeen District Tramways Co.*, [1897] A. C. 111.

[7] *Chapman* v. *Fylde Co.*, [1894] 2 Q. B. 599.

[8] *English* v. *Sewell* (1908), 72 J. P. (Journal) 400 ; and see *Turner* v. *Coates*, [1917] 1 K. B. 670.

[9] *Parker* v. *London General Omnibus Co.* (1909), 25 Times L. R. 429 ; *Wing* v. *London General Omnibus Co.*, [1909] 2 K. B. 652.

The common law made it the duty of every private citizen to prevent his land from being so used as to become a public nuisance.[2] But a highway authority stands in a somewhat different position: it cannot be made liable in damages for a mere nonfeasance or omission to perform its duty, *e.g.*, for neglecting to repair the highway.[3] The proper remedy for such neglect is a complaint to the Local Government Board under section 299 of the Public Health Act, 1875. But if the surveyor or other officer of a district or borough council has in the execution of his duties done any wrongful act, or committed any default other than passive neglect, the council is liable in damages.[5]

Thus it is the duty of the sanitary authority in London to keep the streets properly swept and cleansed;[6] this involves the removal of snow; yet if the authority omit to sweep away the snow, a man who suffers special damage in consequence has no right of action.[7]

It sometimes happens that a particular person uses the highway in an extraordinary manner or to an unusual degree; and though such user may not be unlawful, nor strictly a nuisance, still it may put an unfair strain on the metalling of the road and cause an undue amount of damage. It was felt that such a person ought to make a special contribution to the funds of the highway authority. Accordingly, by section 23 of the Highways and Locomotives (Amendment) Act, 1878,[8] whenever damage has been caused to a highway "by excessive weight passing along the same, or extraordinary traffic thereon," the expense of repairing it can be recovered from the person who created the traffic. But the traffic created must be extraordinary, not merely an increase of ordinary traffic.[1] If the amount does not exceed £250, it may be recovered in the county court, otherwise the action must be brought in the High Court;[2] but in neither case can an action be brought to recover the expenses of repairs occasioned by extraordinary traffic, &c., until the repairs have been executed.[3]

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[1] *Reedie* v. *L. & N. W. Ry. Co.* (1849), 4 Exch. 244.

[2] *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560; 566.

[3] *Thomson* v. *Mayor, &c., of Brighton*, [1894] 1 Q. B. 332; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433.

[4] 38 & 39 Vict. c. 55; *Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619; *Peebles* v. *Oswaldtwistle U. D. C.*, [1898] A. C. 387.

[5] The action must be brought within six months after the act complained of, under the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

[6] 54 & 55 Vict. c. 76, s. 29.

[7] *Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64; and see *Att.-Gen.* v. *Guardians of the Poor for Dorking* (1881), 20 Ch. D. 595.

[8] 41 & 42 Vict. c. 77; and see *Kent C. C.* v. *Vidler*, [1895] 1 Q. B. at p. 452; *Morpeth R. D. C.* v. *Bullocks Hall Colliery Co., Ltd.*, [1913] 2 K. B. 7

Again any man, who does anything which vitiates the air or poisons the water supply of a particular neighbourhood, or renders life in that neighbourhood sensibly less salubrious or enjoyable, will be guilty of a public nuisance.[4] And any private individual, whose health is injured, or whose vigour is impaired, or whose property is damaged by the act of the defendant, will have a right of action in tort for such special injury.[5] This special injury must be something different in its nature from the annoyance suffered by the public generally. It is not sufficient that the plaintiff is affected by the nuisance to a greater extent than his neighbours, if he is affected by it in the same way. If the chimney of a factory emits noxious fumes, which annoy all who reside in its neighbourhood to a greater or less extent, this is a public nuisance for which none of them can bring an action, unless he has suffered some other damage different in kind from that which his neighbours have sustained. But remember that "it takes more than one puff of smoke to create a nuisance by noxious vapour, and more than one bang of a big drum to create a nuisance by noise."[6]

The defendants, a tramway company, who were by their special Act under an obligation to pave with wood paving certain parts of a road on which their tramway was laid, used for that purpose wood blocks coated with creosote. The fumes given off by the creosote injured plants and shrubs belonging to the plaintiff, a market gardener, whose premises were near the road. There was another kind of wood paving in use, which the defendants might have used and which could not have caused injury to the plaintiff's plants and shrubs. The jury found that according to the defendants' knowledge at the time it was reasonably necessary for them to pave the road as they did, but that in the light of the evidence given at the trial it was not reasonably necessary, and it was held that the defendants were not authorised by their special Act to use the particular kind of wood paving which they had used and that, although they did not know that the use of creosoted wood might cause damage and were not guilty of negligence, they were, upon the principle laid down in *Rylands* v. *Fletcher*,[1] liable to the plaintiff in respect of the damage sustained by him.[2]

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[1] *Weston-super-Mare U. D. C.* v. *Henry Butt & Co.*, [1919] 2 Ch. 1; and see *Barnsley, &c., Society* v. *Worsborough U. D. C.*, [1916] 1 A. C. 291; *Abingdon R. D. C.* v. *Oxford Tramways, Ltd.*, [1917] 2 K. B. 318.

[2] The Locomotives Act, 1898 (61 & 62 Vict. c 29), s. 12; *Ripon R. D. C.* v. *Armitage and Hodgson*, [1919] 1 K. B. 559. As to the limit of time within which an action may be brought, see *Kent C. C.* v. *Folkstone Corp.*, [1905] 1 K. B. 620; and *Bromley R. D. C.* v. *Croydon Corp.*, [1908] 1 K. B. 353. For the pleadings in such an action see Bullen and Leake, 7th ed., pp. 331, 756.

[3] *Little Hulton U. D. C.* v. *Jackson* (1904), 68 J. P. 451.

[4] See, for instance, *Foster* v. *Warblington U. D. C.*, [1906] 1 K. B. 648.

[5] It was formerly held, *e.g.*, in *Vaughan* v. *Taff Vale Ry. Co.* (1860), 6 H. & N. 679, that in the absence of negligence a railway company could not be held liable for damage arising out of the use of their statutory powers. But the Railway Fires Act, 1905 (5 Edw. VII. c. 11), does away with this defence and compels them to pay compensation in all cases where the claim is for damage done to agricultural lands or crops and does not exceed £100.

[6] *Per* Lord Parker in *Hammerton* v. *Dysart*, [1916] 1 A. C. at p. 86.

It is also a public nuisance to place upon the market or offer for sale meat or provisions of any sort which are unfit for human food. The criminal and civil liability of one who sells such food is regulated by the Sale of Food and Drugs Acts.[3] Victuallers, butchers and other common dealers in provisions are not merely presumed to undertake to supply a good and merchantable article, as are dealers in other commodities; but they are also liable to punishment for selling corrupt victuals, and are therefore responsible civilly to those customers to whom they sell such victuals for any special or particular injury which results.[4] Sometimes the word "knowingly," "wilfully" or the like appears in the section creating the offence, and in such cases guilty knowledge must be proved, though this is not necessary where such words are not in the section.[5] And it is specially provided[6] that the accused may recover from the person who sold him the article in question the penalties and costs incurred, if the sale to him was a breach of contract and if he bought innocently and resold the article in the state in which he received it.

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[1] (1868) L. R. 3 H. L. 330.

[2] *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14; and see *Mansell* v. *Webb* (1918), 88 L. J. K. B. 323.

[3] 1875 (38 & 39 Vict. c. 63); 1879 (42 & 43 Vict. c. 30); 1899 (62 & 63 Vict. c. 51); and see the Public Health (Regulations as to Food) Act, 1907 (7 Edw. VII. c. 32), and the regulations issued thereunder by the Local Government Board.

[4] *Shillito* v. *Thompson* (1875), 1 Q. B. D. 12; *Pearks, Gunston & Tee, Ltd.* v. *Ward*, [1902] 2 K. B. 1.

[5] *Betts* v. *Armstead* (1888), 20 Q. B. D. 771; *Spiers & Pond* v. *Bennett*, [1896] 2 Q. B. 65; *Smithies* v. *Bridge*, [1902] 2 K. B. 13.

[6] 38 & 39 Vict. c. 63, s. 28.

There are numerous other instances of acts endangering the public health; and if damage ensues to a particular individual over and above that sustained by every member of the public, he will have a good cause of action. Thus, if a man caught an infectious disease through another breaking quarantine, or through the failure of a cabman to disinfect his cab after taking a smallpox case to the hospital, he could sue for damages.

PRIVATE NUISANCES.

Any act which, if it affected many persons, would be a public nuisance is a private nuisance when it affects only one or two. The distinction turns on the extent of the injury. It does not follow, because a thing complained of is a nuisance to several individuals, that it is therefore a public nuisance. For instance, the obstruction of a right of light or other easement is now regarded as a private nuisance,[1] and if a man by building up a wall darkens the ancient windows of several different dwelling-houses, he is not therefore guilty of a public nuisance. Again, a peal of bells is no nuisance or inconvenience whatever, but is even pleasant, to those who are at a distance from it. Hence it cannot be a public nuisance. But it may be a private nuisance to those who live close to the church, if the bells be rung at unreasonable hours.[2]

Any act, then, other than a direct physical interference,[3] or any omission to discharge a legal duty, which materially impairs the use and enjoyment of a man's property or prejudicially affects his health, comfort or convenience, is a private nuisance, for which he can claim damages in an action of tort.

Whether a nuisance exists or not in any particular case is a question of fact for the jury, subject of course to the direction of the learned judge as to what can in law be a nuisance. It often becomes a question of degree. Regard must be had to all the surrounding circumstances, and especially to the neighbourhood in which the alleged nuisance exists. In *Bamford* v. *Townley*[1] Pollock, C. B., said: "I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances—the place where, the time when, the alleged nuisance, what, the mode of committing it, how and the duration of it, whether temporary or permanent, occasional or continual—as to make it impossible to lay down any rule of law which will be applicable to every case, and which will also be useful in assisting a jury to come to a satisfactory conclusion; it must at all times be a question of fact with reference to all the circumstances of the case."

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[1] See *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179. This subject is dealt with *post*, p. 571.

[2] *Soltau* v. *De Held* (1851), 2 Sim. N. S. 133.

[3] Any direct physical interference with a man's land, goods or person would be a trespass: *ante*, pp. 445, 458, 470.

It is not always easy to determine what amount of personal inconvenience is necessary to afford a right of action. There must be "an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among the English people."[2] If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations which are needed for trade and commerce, for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. "If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop."[3] But any unjustifiable act, which destroys or impairs the ordinary comfort or amenity of a man's home to an appreciable extent, is a nuisance.[4]

So, too, excessive noise or vibration is a nuisance.[5] There is no definite legal rule or measure as to what amount of annoyance caused thereby will be sufficient to sustain an action. It is a question of fact in each case, having regard to all the surrounding circumstances. "A nuisance by noise is emphatically a question of degree."[1] Again, where it is alleged that a manufacturer has by his works caused a nuisance to adjacent land, and he claims no right to do so by prescription or agreement, the following principles must be applied :—Every man is bound to use his own property in such a manner as not to injure that of his neighbours ; but *de minimis non curat lex*, and therefore to be actionable the injury must visibly diminish the value of the plaintiff's property or his enjoyment of it ; all the surrounding circumstances should be considered by the jury in determining whether any appreciable injury has been sustained by the plaintiff. Thus, the erection of a smelting-house for lead so near the land of another that the vapour and smoke kills his corn and grass, and injures his cattle, is an actionable nuisance.

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[1] (1862) 3 B. & S. at p. 79.

[2] *Per* Knight-Bruce, V.-C., in *Walter* v. *Selfe* (1851), 4 De G. & S. at p. 322, adopted in *Soltau* v. *De Held* (1851), 2 Sim. N. S. at p. 159; and see *Fleming* v. *Hislop* (1886), 11 App. Cas. 686, 690; *Christie* v. *Davey*, [1893] 1 Ch. 316.

[3] *Per* Lord Westbury, L. C., in *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. at p. 650.

[4] *J. Lyons & Sons* v. *Wilkins*, [1899] 1 Ch. 255, *post*, p. 632; and see s. 7 of the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), as amended by the Trades Disputes Act, 1906 (6 Edw. VII. c. 47), s. 2; and *Walters* v. *Green*, [1899] 2 Ch. 696.

[5] *Jenkins* v. *Jackson* (1888), 40 Ch. D. 71; *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; *Christie* v. *Davey*, [1893] 1 Ch. 316; *Att.-Gen.* v. *Cole & Son*, [1901] 1 Ch. 205; *Colwell* v. *St. Pancras Borough Council*, [1904] 1 Ch. 707.

To succeed in such an action the plaintiff must prove –

(i.) that the defendant did some act which was a nuisance to the plaintiff ; and

(ii.) that some damage or inconvenience has resulted to the plaintiff therefrom.

It is not necessary for the plaintiff to prove either that the defendant intended to create a nuisance or that he was guilty of negligence.[2] It is enough that the defendant has in fact interfered with the plaintiff's comfortable enjoyment of his rights ; it does not matter how this happened or why it was done. On proof of the existence of the nuisance and of consequent damage to him, the plaintiff will generally be entitled both to recover damages for the injury already sustained and to obtain an injunction to restrain the continuance or repetition of the injury. But an injunction will not, as a rule, be granted where the injury to the plaintiff's right is trifling, where the payment of damages is an adequate compensation or where, in the special circumstances, it would be oppressive to the defendant to grant an injunction.[3]

The plaintiff has another remedy : he may enter on the land from which the nuisance proceeds and himself abate the nuisance, if he can do so peaceably. He must be careful to do no more damage there than is absolutely necessary to put a stop to the annoyance which he experiences.[1]

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[1] *Per* Lord Selborne, L. C., in *Gaunt* v. *Fynney* (1872), 42 L. J. Ch. at p. 123.

[2] *West* v. *Bristol Tramways Co.*, [1908] 2 K. B 14.

[3] See the judgment of Smith, L. J., in *Shelfer* v. *City of London Electric Light Co.*, [1895] 1 Ch. at pp. 322, 323 ; *Wood* v. *Conway Corp.*, [1914] 2 Ch. 47 ; and Injunction, *post*, p. 1156.

To pollute a stream in such a manner as to drive away the fish and to damage the spawning beds is a nuisance, for which the owner of a right of fishing in the stream can maintain an action at common law.[2] So, where the defendants impregnated the water of a running stream with sulphuric acid and other deleterious matters, which corroded and destroyed the boilers and other parts of the machinery in the plaintiff's mill which was further down the stream, it was held that the plaintiff was entitled to damages.[3]

Where a tree on one man's land spreads its branches so that they overhang the land of his neighbour, this is a nuisance, which entitles the neighbour to lop the branches so far as they overhang, though they may have done so for more than twenty years.[4]

A mere omission to perform a duty may create a nuisance. Thus, for instance, if my neighbour is bound to scour a ditch or cleanse and keep in repair a drain, and by his omission to do so my land is overflowed and my goods are damaged, this is an actionable nuisance, whether his omission be intentional or negligent.

There is a large class of cases of private nuisance which is governed by the principle laid down in *Rylands* v. *Fletcher*.[5] That case decided that a person, who for his own purposes brings on to his own land and collects and keeps there anything likely to do injury if it escapes, is *primâ facie* answerable for all the natural consequences of its escape. He can only excuse himself by showing that the escape was due to the plaintiff's fault or was the consequence of the act of God, *vis major* or inevitable accident.

Thus, if a man for his own purposes collects water on his land in an artificial reservoir, he is under an absolute duty to keep it there at his peril, not merely a duty to take all proper and prudent precautions to keep it there.[6] So, where the defendant placed upon his land an artificial mound or embankment, it was held that it was his duty to prevent water from running off it on to the plaintiff's land and rendering his house damp.[7]

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[1] A private individual has no right to abate a public nuisance, unless he has sustained particular damage, sufficient to entitle him to bring an action of tort: *Dimes* v. *Petley* (1850), 15 Q. B. 276; *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. 96.

[2] *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96.

[3] *Pennington* v. *Brinsop Hall Coal Co.* (1877), 5 Ch. D. 769; *Ormerod* v. *Todmorden Mill Co.* (1883), 11 Q. B. D. 155; and see the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75).

[4] *Lemmon* v. *Webb*, [1895] A. C. 1; *Mills* v. *Brooker*, [1919] 1 K. B. 555; and see *Ponting* v. *Noakes*, [1894] 2 Q. B. 281.

[5] (1868) L. R. 3 H. L. 330.

[6] *Rylands* v. *Fletcher*, *suprà*. This will not be so where a man brings water on to his land for public purposes: *Madras Ry. Co.* v. *Zemindar of Carvatenagarum* (1874), L. R. 1 Indian App. Cas. 364.

[7] *Hurdman* v. *N. E. Ry. Co.* (1878), 3 C. P. D. 168; *Broder* v. *Saillard* (1876), 2 Ch. D. 692.

The rule in *Rylands* v. *Fletcher* applies not only to water,[1] but also to electricity,[2] and to fumes arising from a pavement of creosoted wood blocks,[3] but not to thistledown blown by the wind from one field to another, unless the defendant himself planted the thistles near the plaintiff's land or was otherwise guilty of negligence,[4] nor to bears brought on to the defendant's land by a stranger.[5] Again, it is quite lawful to keep wild animals on one's land, if they are kept under proper control. But if the owner of land chooses to bring them on to his land, he must keep them there or take the consequences.

Anyone, who keeps an animal of a savage or mischievous kind, such as a bear, monkey or elephant, is bound to keep it securely at his peril and, apart from any question of negligence, is liable for any damage which it may do.[6] Thus, where the defendant had placed a horse, which he knew to be savage and accustomed to bite human beings, in a field through which he was aware that many persons, without his permission, habitually took a "short cut" to the railway station, it was held that he was liable for an injury to one of such persons who was bitten by the horse, although there was no public right of way across the field.[7] But the owner of an animal is not liable to a person who brings the injury upon himself, *e.g.*, by teasing or exciting the animal.[8] On the other hand, the keeper of animals that are not fierce by nature, such as dogs, cattle or horses, is not in general liable for damage done by them to human beings, unless he knows that they are vicious.[9] Thus, if A.'s dog bites B., A. will not be liable to pay B. damages, unless B. can prove that the dog was to A.'s knowledge of a fierce or savage disposition either generally or under the special circumstances.[10] The best proof of this will be that A. knew that his dog had on some previous occasion bitten or attempted to bite a human being. Mere proof that it had to A.'s knowledge bitten some animal will not suffice.[11] But A. will not be liable if at the time of the injury B. was a trespasser on A.'s land.[12]

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[1] *Nichols* v. *Marsland* (1875), 2 Ex. D. 1 ; *Nugent* v. *Smith* (1876), 1 C. P. D. 423 ; *Box* v. *Jubb* (1879), 4 Ex. D. 76.

[2] *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186.

[3] *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14 ; and see *Mansell* v. *Webb* (1918), 88 L. J. K. B. 323.

[4] *Giles* v. *Walker* (1890), 24 Q. B. D. 656.

[5] As to rats, see *Stearn* v. *Prentice Brothers, Ltd.*, [1919] 1 K. B. 394.

[6] *May* v. *Burdett* (1846), 9 Q. B. 101 ; *Besozzi* v. *Harris* (1858), 1 F. & F. 92 ; *Wyatt* v. *Rosherville Gardens Co.* (1887), 2 Times L. R. 282 ; *Filburn* v. *People's Palace Co.* (1890), 25 Q. B. D. 258 ; *Holgate* v. *Bleazard*, [1917] 1 K. B. 443.

[7] *Lowery* v. *Walker*, [1911] A. C. 10.

[8] *Marlor* v. *Bull* (1900), 16 Times L. R. 239.

[9] See *Clinton* v. *J. Lyons & Co., Ltd.*, [1912] 3 K. B. 198.

[10] *Read* v. *Edwards* (1864), 17 C. B. N. S. 245 ; *Barnes* v. *Lucille, Ltd.* (1907), 96 L. T. 680.

[11] *Osborn* v. *Choqueel*, [1896] 2 Q. B. 109.

[12] *Sarch* v. *Blackburn* (1833), 4 C. & P. 297.

The law as to biting or worrying animals is different, for it has been enacted by statute that if A.'s dog bites B.'s cattle, horses, mules, asses, sheep, goats or swine, it is not necessary in an action brought to recover damages for B. to prove that the dog had a previous mischievous propensity.[1] All that B. has to prove is that the dog did the injury and that the dog is the property of A.[2]

The question sometimes arises whether liability should fall on the owner or the occupier of premises which are a nuisance. Where the owner of the premises on which the nuisance exists is himself in occupation of them,[3] or has in some manner participated in or expressly sanctioned the erection of the nuisance,[4] liability may attach to him. Thus, if a landlord lets premises not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant, especially where he has placed the tenant under a covenant or agreement not to use them so as to create a nuisance. So if a landlord grants a lease and covenants to keep the premises in repair, he is *prima facie* liable for any nuisance arising from such premises being out of repair.[5]

As a general rule an owner of real property, such as land or houses, is not "responsible for nuisances occasioned by the mode in which his property is used by others not standing in the relation of servants to him or part of his family. It may be that in some cases he is so responsible. But then his liability must be founded on the principle that he has not taken due care to prevent the doing of acts which it was his duty to prevent, whether done by his servants or others. If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, *sic utere tuo ut alienum non laedas*."[6]

But where the defendants owned the soil of a stream which supplied water to two print works, and the lessee of one of them erected a weir which diverted the water from the plaintiff's print works, and re-erected it after the plaintiff had removed it, the Court held that the plaintiff was rightly nonsuited; and that, as there was no evidence of acquiescence by the defendants in the continuation of the nuisance, they could not be held responsible for the act of their lessee.[1]

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[1] 6 Edw. VII. c. 32, s. 1 (1).

[2] *Baker* v. *Snell*, [1908] 2 K. B. 825.

[3] See *Bishop* v. *Trustees of Bedford Charity* (1859), 1 E. & E. 697, 714; *Preston* v. *Norfolk Ry. Co., &c.* (1858), 2 H. & N. 735.

[4] *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658; and see *Nelson* v. *Liverpool Brewery Co.* (1877), 2 C. P. D. 311; *Bowen* v. *Anderson*, [1894] 1 Q. B. 164.

[5] *Rich* v. *Basterfield* (1847), 4 C. B. 783, 804.

[6] *Per cur.* in *Reedie* v. *L. & N. W. Ry. Co.* (1849), 4 Exch. 244.

Where one employs another to do an act which may be done in a lawful manner, and the latter in doing it unnecessarily commits a public nuisance and injury results to a third person, the employer will not be responsible in damages for such injury.[2] If however A. employs B., a contractor, to do an unlawful act—*e.g.*, to erect a nuisance in the public highway—which B. does by his workmen and servants, A. will be answerable in an action of tort for damage resulting to a third party.[3]

A private nuisance generally arises on the premises of the defendant, and its baneful consequences extend thence to the premises occupied by the plaintiff. It may thus cause damage either to person or to property—in some cases to both. As a general rule, the injury to health or other inconvenience to a person is the result of his occupation of premises in close proximity to the nuisance. In such a case the owner of the property may also have a cause of action, if the proximity of the nuisance has diminished the saleable value of his property. The acts of several persons may together constitute a nuisance, which the Court will restrain, though the damage occasioned by the acts of any one, if taken alone, would be inappreciable.[4]

Defences.

We have already discussed, under the head of "Criminal Law," the defences which can be raised to an indictment for a public nuisance.[5] These defences are also available in a civil action for damages arising out of either a public or a private nuisance. It is only necessary here to refer briefly to the following.

It will be a defence to any action of nuisance if the defendant can show that he was authorised by statute to do the acts which caused the nuisance. But the Court will not construe a statute as justifying a nuisance unless the words are clear and express. "The question in each case turns on the construction of the Act of Parliament. An Act of Parliament may authorise a nuisance, and if it does so, then the nuisance which it authorises may be lawfully committed. But the authority given by the Act may be an authority which falls short of authorising a nuisance. It may be an authority to do certain works, provided that they can be done without causing a nuisance. . . . Again, the authority given by Parliament may be to carry out the works without a nuisance if they can be so carried out, but in the last resort to authorise a nuisance, if it is necessary for the construction of the works."[1]

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[1] *Saxby* v. *Manchester, Sheffield, &c., Ry. Co.* (1869), L. R. 4 C. P. 198.

[2] *Mills* v. *Holton* (1857), 2 H. & N. 14; *Williams* v. *Jones* (1865), 3 H. & C. 602.

[3] *Ellis* v. *Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767; *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (1861), 6 H. & N. 488.

[4] *Thorpe* v. *Brumfitt* (1873), L. R. 8 Ch. 650.

[5] See *ante*, pp. 243, 244.

Thus a local authority, though directed or empowered by statute, cannot set up the statute as a defence to committing a nuisance, unless the words of the statute are clearly imperative and there was no other way of carrying out the directions of the statute but by committing a nuisance.[2] So permission contained in a lease to carry on a trade is not a "permission to carry it on in such a manner as to create a nuisance," unless, indeed, the trade authorised cannot be carried on without committing a nuisance.[3]

There can be no prescriptive right to commit a public nuisance; but a right to commit a private nuisance may be acquired by prescription, *e.g.*, a right to foul a stream.[4] The prescriptive period does not begin to run until a nuisance has in fact been created.

Again, it will be a defence to the action if the defendant can show that the real cause of the injury was an "irresistible act of nature,"[5] or an act of God,[6] or something otherwise beyond his control.[7] So, too, it will be an answer to the action if the injury was due to the act or default of a stranger, unless the defendant could reasonably be expected to provide against such act or default.[1]

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[1] *Per* Bowen, L. J., in *Truman* v. *L. B. & S. C. Ry. Co.* (1885), 29 Ch. D. at p. 108; and see *Wallace* v. *M'Cartan*, [1917] 1 I. R. 377.

[2] *Hill* v. *Metropolitan Asylum District Board* (1881), 6 App. Cas. 193; and see *Price's Patent Candle Co., Ltd.* v. *L. C. C.*, [1908] 2 Ch. 526.

[3] *Pwllbach Colliery Co., Ltd.* v. *Woodman*, [1915] A. C. 634; *Phelps* v. *City of London Corporation*, [1916] 2 Ch. 255.

[4] *Crossley, Ltd.* v. *Lightowler* (1867), L. R. 2 Ch. 478; but see *Fowler* v. *Sanders* (1617), Cro. Jac. 446; and *Lemmon* v. *Webb*, [1895] A. C. 1.

[5] *Nugent* v. *Smith* (1876), 1 C. P. D. 423.

[6] *Nichols* v. *Marsland* (1876), 2 Ex. D. 1.

[7] *Box* v. *Jubb* (1879), 4 Ex. D. 76.

Suppose a vessel, which is properly navigating a public river, is through no fault of those on board it run into and sunk by another vessel, and becomes a danger to all using that waterway. What is the duty of its owner? "There seems no doubt that it is the duty of a person using a public navigable river, with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to other vessels; and that, in case of a collision arising from his negligence, he must sustain, without compensation, the damage occasioned to his own vessel and is liable to pay compensation for that sustained by another navigated with due skill and care. And this liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it; in all these circumstances the vessel may continue to be in his possession and under his management and control; and supposing it to be so and a collision with another vessel to occur from the improper manner in which one of the two is managed, the owner of the vessel properly managed is entitled to recover damages from the owner of that which was improperly managed. This duty of using reasonable skill and care for the safety of other vessels is incident to the possession and control of the vessel."[2]

A person, however, may cease to have the possession and control of a vessel by some casualty of navigation; if this occurs from unavoidable accident and if the owner is wholly blameless in the matter, he cannot be compelled to remove the sunken vessel, although it is an obstruction to navigation, nor even it seems to take measures for diminishing the danger. No indictment would lie under such circumstances for the danger and impediment to the public, and therefore no action would be maintainable for particular damage resulting to an individual from the obstruction.

It is no defence to an action for nuisance that the nuisance existed before the plaintiff came to reside in its neighbourhood, whether he knew the fact or not.[3] Thus where the defendant's stable was built so close to the wall of the plaintiff's residence that the stamping and kicking of the horses, the rattling of ropes, chains and blocks against the ring-bolts and mangers, caused great discomfort and annoyance to the plaintiff and his family, this was held to be an actionable nuisance, though the stable had existed there before the plaintiff came to reside in the house.[1]

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[1] *Box* v. *Jubb* (1879), 4 Ex. D. 76.

[2] *Per cur.* in *Brown* v. *Mallet* (1848), 5 C. B. at p. 616; and see *Vivian* v. *Mersey Docks Board* (1869), L. R. 5 C. P. 19, 29. As to the liability of commissioners, trustees and harbour authorities acting under the statute law for negligence and breach of duty, see *R.* v. *Williams* (1884), 9 App. Cas. 418; *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400. 403; *Cowley* v. *The Newmarket Local Board,* [1892] A. C. 345; *Arrow Shipping Co.* v. *Tyne Improvement Commissioners,* [1894] A. C. 508.

[3] *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852; and see the remarks of Lord Halsbury, L.C., in *L. B. & S. C. Ry. Co.* v. *Truman* (1885), 11 App. Cas. at p. 52, and of Earl of Selborne at p. 56.

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[1] *Broder* v. *Saillard* (1876), 2 Ch. D. 692; and see *Sanders-Clark* v. *Grosvenor Mansions*, [1900] 2 Ch. 373; and *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205.

CHAPTER IX.

DEFAMATION.

We pass now to consider acts which are injurious to the reputation of an individual. And first among these we must place the publication of defamatory words. Such publication will give rise to an action either of libel or of slander according to the circumstances. If the words be written or printed or recorded in any other permanent form, the plaintiff's proper remedy will be an action of libel; if on the other hand the words be merely spoken, his action, if any, will be an action of slander. In either case the words must be defamatory, *i.e.*, such as the law deems injurious to the reputation of the plaintiff. But it is not by words alone that a man's reputation can be injured. Thus a statue, a picture or a caricature may be a libel; so may a chalk mark on a wall, a waxwork figure, an effigy or any other contumelious sign of a more or less permanent character.

In order to decide in any given case whether the words are defamatory we must first discover what meaning they conveyed to those who read or heard them. This must depend mainly on the words themselves, but also to some extent on the plaintiff's office, profession or trade, and on all the surrounding circumstances. No general rule can be laid down defining absolutely and once for all what words are defamatory and what are not. Words which would seriously injure A.'s reputation might do B.'s no harm. Each case must be decided on its own facts, and in each case the test is this: Have the defendant's words appreciably injured the reputation of the plaintiff?

But the plaintiff's reputation cannot be injured unless the defendant's words be communicated to some third person. If they are written or printed, some one must read them; if they are spoken, some one must hear them. Thoughts by themselves are not actionable: merely composing or even writing down defamatory words is not a tort, unless they be subsequently published. No action will lie if the words be communicated only to the person defamed; for that does not injure his reputation, though it may wound his self-esteem. A man's reputation is the estimate in which others hold him, not the good opinion which he has of himself. It may be that the defendant desired and intended, and did all in his power, to publish words defamatory of the plaintiff, yet if they never reach the ear or eye of any one except the plaintiff, no tort has been committed. To be actionable, the words must be published by the defendant to some person other than the plaintiff, and must make that other person think worse of the plaintiff.

The intention or motive with which the words were published is, as a rule, immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he had no such purpose in his mind when he spoke or wrote the words. Every one must be presumed to know and to intend the natural and ordinary consequences of his acts. Even if the defendant at the time he published the words did not attend to or think of their natural or probable consequences, or hoped or expected that these consequences would not follow, this can only go to mitigate the damages; it is no answer to the action.

Sometimes, however, it is a man's duty to speak fully and freely and without thought or fear of the consequences, and then the above rule does not apply. The words are privileged by reason of the occasion on which they were employed; and no action lies unless the plaintiff can prove that the defendant was actuated by some wicked or indirect motive. But in all other cases (although the pleader invariably alleges that the words were published falsely and maliciously) malice need never be proved at the trial; the words are actionable, if false and defamatory, although published inadvertently or with an honest belief in their truth. Unless the occasion be privileged, malice is no part of the cause of action;

"nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had before heard, but without naming the author) upon which, if that were a tenable ground, verdicts would have been sought for and obtained; and the absence of any such instance is a proof of what has been the general and universal opinion upon the point." [1]

Thus, where the printers of a newspaper by a mistake in setting up the type inserted the name of a firm under the heading "First Meetings under the Bankruptcy Act" instead of under "Dissolutions of Partnership," the firm recovered damages from the proprietor of the paper, although an ample apology had been made and no damage had followed the publication, and there was no suggestion of malice.[2] Similarly damages were recovered where the proprietors of a newspaper in all innocence announced that a lady, who had in fact been married only a month, had given birth to twins.[3]

The plaintiff need give no evidence that the words are false; it is always presumed in his favour that they are untrue; it is for the defendant to prove that his words are true. Nor need the plaintiff, as a rule, show that he has sustained any actual pecuniary loss. If in any given case the words employed by the defendant have appreciably injured the plaintiff's reputation, he has suffered an injury which is actionable without proof of any other damage. Every man has an absolute right to have his person, his property and his reputation preserved inviolate. In some cases an injury to the reputation of another is treated as a crime;[4] in all cases it is *primâ facie* a tort and actionable, as a rule, without proof of special damage caused to the plaintiff thereby. Just as any invasion of a man's property is actionable without proof of any pecuniary loss, so is any serious disparagement of his good name. But in many cases, where the words are only spoken and are not of so grave an import that they must necessarily damage the reputation of the plaintiff, the law refuses to presume any injury to the plaintiff and requires strict proof of some actual pecuniary loss, flowing directly from the defendant's publication of the defamatory words.

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[1] *Per* Bayley, J., in *Bromage* v. *Prosser* (1825), 4 B. & C. at p. 257.

[2] *Shepheard* v. *Whitaker* (1875), L. R. 10 C. P. 502.

[3] *Morrison* v. *Ritchie & Co.* (1902), 4 F. 645 (Ct. of Sess.).

[4] See *ante*, pp. 176, 181—183.

In order, then, to establish a *primâ facie* case in an ordinary action of libel, the plaintiff has only to prove that the defendant has published written or printed words defamatory of the plaintiff. In all actions of slander the plaintiff has to prove that the defendant spoke and published words defamatory of the plaintiff, and in many cases[1] he must go further and show that special damage to himself has ensued from their utterance.

(i.) *Publication.*

First, then, the words must be published. They must be published by the defendant who is sued in the action, or by some one who is his agent in that behalf.[2] They must be published to some third person, not merely to the plaintiff himself, for a publication only to a person defamed is in a civil action no publication at all.[3] A publication to the plaintiff's wife is sufficient;[4] but a publication by the defendant to his own wife gives rise to no cause of action, because communications between husband and wife are "held sacred."[5] Publication by the defendant to his own clerk or typist is a publication in law, although the occasion is often privileged.

A libel may be published in various ways, *e.g.*, by reading it aloud, by selling it or distributing it gratis, by sending it through the post or otherwise to any third person who opens and reads it. A letter is published as soon as it is posted, provided it is subsequently opened in due course and read by any third person.[6]

The two cases of *Pullman* v. *Hill*[7] and *Boxsius* v. *Goblet Frères*[8] may be usefully contrasted. In the former a letter containing the alleged libel was dictated to a shorthand clerk, who subsequently wrote the letter out in longhand. After being copied by an office boy in a press copy-book, it was sent addressed to the plaintiffs, and was opened by one of the plaintiffs' clerks. The Court of Appeal decided that there was publication to the clerks both of the plaintiffs and defendants and that neither occasion was privileged. In the latter case a solicitor dictated to his clerk a letter, written on behalf of his client. The letter, which contained the alleged libel, was addressed and sent to the plaintiff after having been copied into the letter-book by another clerk. The publication to the solicitor's clerks was held by the Court of Appeal to have been necessary and usual and in the interest of the client, and so privileged.

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[1] See *post*, pp. 522, 525.

[2] See *Parkes* v. *Prescott* (1869), L. R. 4 Ex. 169.

[3] It is otherwise in criminal proceedings; see *ante*, p. 172.

[4] *Wenman* v. *Ash* (1853), 13 C. B. 836; *Jones* v. *Williams* (1885), 1 Times L. R. 572.

[5] *Per* Manisty, J., in *Wennhak* v. *Morgan* (1888), 20 Q. B. D. at p. 639.

[6] See *Huth* v. *Huth*, [1915] 3 K. B. 32; *Powell* v. *Gelston*, [1916] 2 K. B. 615.

[7] [1891] 1 Q. B. 524.

[8] [1894] 1 Q. B. 842; followed in *Edmondson* v. *Birch & Co., Ltd.*, [1907] 1 K. B. 371, and in *Roff* v. *British and French Chemical Manufacturing Co.*, [1918] 2 K. B. 677.

If a man desires and intends and does all in his power to publish defamatory words, and yet they never reach the eyes of any one except the plaintiff himself, no action lies. On the other hand, if a man unintentionally or accidentally publishes defamatory words to a third person, an action will lie.[1] This is so whenever the defendant himself composed or wrote the libel, or caused it to be printed or written. The rule is the same whenever the defendant had read the words, and was therefore aware of their libellous character, before he published them. But where the defendant did not himself compose or write the words or cause them to be printed, and has not himself read them, he will not be liable, if he can satisfy the jury that he was guilty of no negligence and was not to blame in the matter.

Thus, the sale of every written or printed copy of a libel is *primâ facie* an actionable publication. But if the defendant is a newsvendor who neither wrote nor printed the libel, but merely sold the newspaper containing it in the ordinary way of his business, and who neither knew nor ought to have known that that newspaper did contain or was likely to contain any libellous matter, he will not be deemed to have published the libel which he thus innocently disseminated.[2]

(ii.) *What do the words mean ?*

Whether the words complained of are defamatory or not, or are actionable or not, must in every case depend on the meaning which the words conveyed to those who read or heard them. Before words can injure any one's reputation, they must be understood to refer to him, and to refer to him in a defamatory sense. The defendant may have meant one thing and said another; he may have aimed at one man and hit another;[1] if so, the law will seize on what he said, and disregard what he meant. The test always is, What meaning did the words in fact convey to people who construed them reasonably? In construing wills, contracts, defamatory words, Acts of Parliament and indeed all legal documents, the first and foremost rule is that a man must be taken to mean what he says. It may be that no defamatory meaning was intended, yet if one was in fact conveyed, the defendant is liable.

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[1] See *ante*, pp. 516, 517.

[2] *Emmens* v. *Pottle* (1885), 16 Q. B. D. 354 ; *Haynes* v. *De Beck* (1914), 31 Times L. R. 115.

In the first place, then, the words must be defamatory, *i.e.*, they must injure the reputation of the plaintiff; they must make people think worse of him. Only the person who is thus exposed to public hatred, contempt or ridicule can bring the action.[2] If words defamatory of A. cause loss or damage to B., B. has as a rule no action; A. alone can sue.

If a defamatory imputation be in fact conveyed, it does not matter how it was expressed. It may be hinted or implied, suggested by a question or a mere adjective, hidden under a nickname or couched in some ironical phrase. If the words in their natural and obvious meaning are harmless, still a further question may arise: Were there any facts known both to writer and reader which would lead the latter to understand the words in a secondary and a defamatory sense? This is a question for the jury, provided there be any evidence to go to them of such facts and provided also it is reasonably conceivable that such facts, if proved, would have induced the reader so to understand the words.

This principle was laid down in the leading case of *Capital and Counties Bank* v. *Henty & Sons*,[3] in which the facts were as follows:—The defendants occasionally received in payment from their customers cheques on various branches of a bank, which the bank cashed for the convenience of the defendants at a particular branch. After a quarrel with the manager of that branch, the defendants sent a printed circular to a large number of their customers (who knew nothing of the dispute) in the following words :—" Messrs. Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." This circular became known to other persons, and there was a run on the bank and loss inflicted. On an action being brought by the bank for libel, it was held by the majority of the House of Lords, affirming the judgment of the majority of the Court of Appeal, that in their natural meaning the words were not libellous ; that the inference suggested by the innuendo was not the inference which reasonable people would draw ; that the *onus* lay upon the plaintiffs to show that the circular had a libellous tendency ; that the evidence, consisting of the circumstances attending the publication, did not show it ; that there was no case for the jury ; and that the defendants were entitled to judgment.

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[1] This point was much discussed in *Jones* v. *E. Hulton & Co.*, [1909] 2 K. B. 444; [1910] A. C. 20.

[2] *Le Fanu* v. *Malcolmson* (1848), 1 H. L. Cas. 637.

[3] (1880), 5 C. P. D. 514; (1882), 7 App. Cas. 741.

Whether the words be written or spoken, it is for the jury, not the judge, to determine what meaning they in fact conveyed.[1] " Libel or no libel is, of all questions, peculiarly one for a jury." [2] It is the duty of the judge to tell the jury what in law is a libel, and then to leave them to decide whether the particular words before them fall within his definition or not. He may, if he wishes, state his own opinion on the question. But if so, this is merely advice to the jury, by which they are not bound.[3] Where, however, the judge is clearly of opinion that the words are incapable of any defamatory meaning, it is his duty to direct the jury as a matter of law to find that there is no libel. But he should only stop the case in this way when he is convinced that no honest jury could reasonably find the words defamatory.[4]

Whenever the meaning is not obvious, and also whenever the words at first sight are not defamatory, it is the duty of the plaintiff to set out in his pleading what he alleges the meaning to be. This allegation is called an innuendo. The defendant in his pleading invariably " traverses the innuendo," that is to say, he denies that his words were understood to mean what the plaintiff alleges they meant. He generally also pleads that the words in their natural and ordinary meaning are not defamatory. This raises several distinct issues: in the first place, it is for the judge to rule whether the words are capable of bearing the meaning ascribed to them by the innuendo; if he rules that they cannot reasonably bear that meaning, the action proceeds as if no innuendo had been pleaded, and the plaintiff can only recover damages for the words in their primary and ordinary meaning. If, however, the judge rules that the words are capable of the meaning ascribed to them by the innuendo, then it will be for the jury to decide whether the words did in fact convey that meaning to those who heard or read them. The jury may, however, answer this question in the negative, and yet award the plaintiff damages for the words in their primary signification.

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[1] *Dakhyl* v. *Labouchere,* [1908] 2 K. B. 325, n. ; and see *Frost* v. *London Joint Stock Bank* (1906), 22 Times L. R. 760, and *Chisholm* v. *Grant,* [1914] S. C. 239.

[2] *Per* Lord Coleridge, C. J., in *Saxby* v. *Easterbrook* (1878), 3 C. P. D. at p. 342.

[3] *Baylis* v. *Lawrence* (1840), 11 A. & E. 920 ; *Darby* v. *Ouseley* (1856), 1 H. & N. 1.

[4] See *McQuire* v. *Western Morning News,* [1903] 2 K. B. 100 ; *Thomas* v. *Bradbury, Agnew & Co.,* [1906] 2 K. B. 627 ; *Moore* v. *Lawson* (1915), 31 Times L. R. 418.

(iii.) *Is proof of special damage necessary?*

The gist of an action for libel or slander is, as we have already seen, the injury done to the plaintiff's reputation; and whenever it is clear that his reputation must have been injured by the publication of the defendant's words, no proof of any actual pecuniary loss is required. But here the law draws a sharp distinction between actions of libel and of slander. Whenever the defamatory words are written or printed or recorded in any permanent form, the plaintiff will not be called upon to show any special damage. In all actions of libel the law presumes that the publication of defamatory words must injure the plaintiff's reputation. But in actions of slander a different rule prevails; the plaintiff must prove some "special damage," except where the words

(*a*) impute a crime;[1]
(*b*) impute a contagious disease;

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[1] If the words merely impute doubt and suspicion, and do not amount to an assertion, express or implied, that the plaintiff is guilty of the alleged crime, they will not be actionable without proof of special damage: *Simmons* v. *Mitchell* (1880), 6 App. Cas. 156.

(*c*) disparage him in the way of his office, profession or trade; or

(*d*) impute unchastity or adultery to any woman or girl.[1]

In no other case are spoken words actionable, unless they have caused some special damage to the plaintiff.

As to persons holding an office, the law draws a distinction between offices of profit, *i.e.*, those to which a salary is attached, and honorary offices, such as that of a sheriff, a justice of the peace, an alderman or town councillor. In the former case an action will lie without proof of special damage for words which impute general unfitness for the office as well as for words imputing misconduct in the office. But in the case of an honorary office no action will lie without proof of special damage, unless the words impute to the plaintiff such misconduct in his office as would, if true, be good ground for his dismissal.

Thus to say of a town councillor, "He is never sober, and is not a fit man for the council; on the night of the election he was so drunk that he had to be carried home," is not actionable unless special damage has ensued.[2] But to impute to an alderman that he has improperly used his position as chairman of the Town Improvement Committee to put money into his own pocket is actionable without proof of any special damage, because, if the charge be true, he ought at once to be removed from his office.[3]

If the plaintiff carry on any profession or trade recognised by the law, or be engaged in any lawful employment, however humble, he can, without proving any special damage, sue for any words which would prejudice him in his profession, trade or employment. It will be otherwise if the words disparage him in some matter unconnected therewith.

Thus to impute bankruptcy to a solicitor is not of itself actionable, for this does not involve any imputation upon him in his profession as a solicitor.[4] So to say of a barman that he has left his lodgings without paying his rent is not actionable, even though he loses his post in consequence of the statement; for the words complained of do not disparage him in the way of his employment.[5]

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[1] Slander of Women Act, 1891 (54 & 55 Vict. c. 51).

[2] *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797.

[3] *Booth* v. *Arnold*, [1895] 1 Q. B. 571.

[4] *Dauncey* v. *Holloway*, [1901] 2 K. B. 441.

[5] *Speake* v. *Hughes*, [1904] 1 K. B. 138, 141.

But any imputation of bankruptcy or insolvency, past, present or imminent, will be held clearly to prejudice a trader in the way of his trade.

Thus to say of a trader, "'Ware hawk there; mind what you are about,' was held actionable, as the plaintiff had pleaded proper averments, showing that the words imputed insolvency.[1] So to say of a tradesman, "If he does not come and make terms with me, I will make a bankrupt of him and ruin him," must be prejudicial to him in his business; for such words necessarily imply that the defendant has the power to carry his threat into effect, and this can only be the case if the plaintiff, though not yet made a bankrupt, is in financial difficulties.[2]

To verbally accuse a man of any immorality or of any vicious and dishonourable (but not criminal) conduct, or even of any fraud and dishonesty outside his profession or trade, is, in the absence of any special damage, not actionable.[3] Words imputing to a man adultery, profligacy, immoral conduct, &c., even though he hold an office or carry on a profession or business, will not be actionable, unless they relate to his conduct in that office, profession or business, or otherwise affect him therein; the imputation must be connected with the professional or business duties of the plaintiff.

Thus, for verbally imputing incontinence to a clergyman no action will lie, without averment and proof of actual damage, unless he is beneficed or holds some clerical office or employment of temporal profit of which he would be liable to be deprived if such words were true.[4] So to say of a schoolmaster that he had committed adultery with a servant employed at the school is not actionable without proof of special damage, as the imputation does not touch him in the way of his calling.[5] But to impute that a master mariner was drunk when he was in command of a vessel is actionable without any proof of special damage.[6]

Any spoken words, however, which disparage the reputation of another are actionable if they have produced any special damage which flowed naturally from the slander. The law regards as special damage any loss of money or money's worth, the loss of a customer or of a marriage, the loss of any post or employment, or of any salary or profit attaching thereto, or even the loss of gratuitous entertainment and hospitality, if the plaintiff can show that it was caused by the defendant's words. But mere annoyance or anxiety or physical illness will not be regarded as special damage, even though clearly the result of the libel or slander. And in all cases the special damage must not be "too remote," that is to say, it must be either the natural and necessary consequence of the defendant's conduct, or such as the defendant can be shown to have contemplated as a result of his publication.[1]

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[1] *Orpwood* v. *Barkes* (*vel Parkes*) (1827), 4 Bing. 261.
[2] *Brown* v. *Smith* (1853), 13 C. B. 596.
[3] See Odgers on Libel and Slander, 5th ed., p. 72.
[4] *Gallwey* v. *Marshall* (1853), 9 Exch. 294.
[5] *Jones* v. *Jones*, [1916] 2 A. C. 481.
[6] *Hamon* v. *Falle* (1879), 4 App. Cas. 247.

A plaintiff, then, establishes a *primâ facie* cause of action if he proves that the defendant has published to some third person words which have injured his reputation. The defendant at the trial may contend that there has been no publication of the words, or no publication by him, or that the words published are not defamatory or do not refer to the plaintiff. Where special damage is a necessary part of the cause of action, he may dispute the existence of any special damage, or argue as a matter of law that such damage, if any, is too remote.[2] Or he may urge in mitigation of damages that he did not act maliciously or unreasonably, but made an honest blunder in trying circumstances; that he acted on information that appeared to him reliable, and did his best to repair the injury as soon as he discovered his mistake. He may apologise and pay money into court.[3] But he more usually relies on one or other of the three following defences :—

(i.) Justification (*i.e.*, that the words are true).

(ii.) Fair and *bonâ fide* comment on a matter of public interest.

(iii.) Privilege.

If the defendant desires to raise any of these defences, he must set out clearly in his Defence the facts upon which he relies; it will not be sufficient for him merely to deny in general terms that he published the words falsely or maliciously.[1] Unless the occasion be shown to be privileged, it is no justification that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication of it, disclosed the name of that person and honestly believed the information to be true.[2]

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[1] See *post*, p. 1294.

[2] See Odgers on Libel and Slander, 5th ed., pp. 403, 406.

[3] See Lord Campbell's Libel Act (6 & 7 Vict. c. 96), ss. 1 and 2 ; and 8 & 9 Vict. c. 75.

TRUTH.

It is a complete answer to any action of libel or slander (though alone it is not a defence in criminal proceedings) for the defendant to prove that his words are true. It is presumed in the plaintiff's favour that all defamatory words are false. The plaintiff therefore need give no evidence to show that the words are false: it is for the defendant to prove they are true; and he will not be allowed to try and prove this, unless he has specially pleaded in his Defence that the words are true. This special plea is called a plea of justification. It must justify the whole charge and the precise charge made against the plaintiff. The defendant cannot plead that he published other words, not those of which the plaintiff complains, and that such other words are true.[3] So if the words be "A. said that the plaintiff had been guilty of fraud, &c.," it is not enough for the defendant to prove that A. said so; he must go further and prove that the plaintiff had in fact been guilty of fraud.

It will be sufficient, however, if the defendant can prove that every imputation which he has made is substantially true. A slight inaccuracy as to some detail will not prevent his succeeding, if such inaccuracy in no way alters the character of the imputation. But if the words which the defendant cannot prove to be true are a material aggravation of the main imputation, or insinuate some further charge in addition to it, the plaintiff will be entitled to a verdict. The test always is—did the words as published have a different effect on the mind of the reader from that which the actual truth would have produced?[4]

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[1] *Belt* v. *Lawes* (1882), 51 L. J. Q. B. 359.

[2] *Tidman* v. *Ainslie* (1854), 10 Exch. 63; and *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396.

[3] *Rassam* v. *Budge*, [1893] 1 Q. B. 571.

[4] Contrast, for instance, the cases of *Alexander* v. *N. E. Ry. Co.* (1865), 34 L. J. Q. B. 634, and *Biggs* v. *G. E. Ry. Co.* (1868), 18 L. T. 482.

Although a plea of justification will not be a bar to the action unless it justifies the whole libel, still the defendant is sometimes allowed, in mitigation of damages, to justify part only, provided such part contains a distinct imputation which can be separated from the rest. So he may sometimes justify as to one portion, and plead privilege or fair comment to the remainder, provided the portion justified be fairly severable from the rest. To be fairly severable, it must be intelligible by itself, and must convey a distinct and separate imputation against the plaintiff.[1] Where the words are laid with an innuendo[2] in the Statement of Claim, the defendant may justify the words, either with or without the meaning alleged in such innuendo.[3] But the defendant must always make it quite clear in his pleading how much he justifies and how much he does not.[4]

Fair Comment on a Matter of Public Interest.

Our law now fully recognises that every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose. This right is in no way the special privilege of the Press; every citizen has full freedom to speak and to write on such matters. Such comments are not libellous, however severe in their terms, so long as the writer truly states his real opinion of the matter on which he comments.[5] "It is only when the writer goes beyond the limits of fair comment that his criticism passes into the region of libel at all."[6]

In order to establish the defence of fair comment the defendant must show—

(*a*) that the words are fairly relevant to some matter of public interest;

(*b*) that they are the expression of an opinion, and not the allegation of a fact;

(*c*) that they do not exceed the limits of a fair comment.

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[1] *Davis* v. *Billing* (1891), 8 Times L. R. 58.

[2] *Ante*, p. 521.

[3] *Watkin* v. *Hall* (1868), L. R. 3 Q. B. 396.

[4] *Fleming* v. *Dollar* (1889), 23 Q. B. D. 388.

[5] *Merivale & wife* v. *Carson* (1887), 20 Q. B. D. 275.

[6] *Per* Lopes, L. J., in *South Hetton Coal Co., Ltd.* v. *N. E. News Association, Ltd.*, [1894] 1 Q. B. at p. 143.

Even then it will be open to the plaintiff to rebut this defence by proving

(*d*) that they were published maliciously.

(*a*) It is a question for the judge to decide whether in the case before him the matter commented on is or is not one of public interest. But it is quite clear that the public conduct of every public man is a matter of public concern. So is the management of every public institution; the conduct of every public body, imperial, local or municipal; the administration of the poor law in any locality,[1] and the sanitary condition of any populous district.[2]

Again, the following are unquestionably matters of public interest:—All affairs of State;[3] the administration of justice (as soon as the case is over); ecclesiastical affairs;[4] all books published, all pictures publicly exhibited;[5] all public entertainments, theatrical performances, concerts, &c.; all advertisements and other appeals to the public.[6]

(*b*) But it must be borne in mind that comment on well-known or admitted facts is a very different thing from the assertion of unsubstantiated facts for comment. "There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the Press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."[7] It is not enough that the writer honestly believed the facts to be as he stated them; if he asserts certain matters to be facts, he must prove them to be so.[1] But sometimes a phrase, which when taken by itself appears to assert a fact, will be found on studying its context to be really only comment on other facts or an inference from them.[2]

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[1] *Purcell* v. *Sowler* (1877), 2 C. P. D. 215.

[2] *South Hetton Coal Co., Ltd.* v. *N. E. News Association, Ltd.*, [1894] 1 Q. B. 133.

[3] *Parmiter* v. *Coupland* (1840), 6 M. & W. 105; *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73.

[4] *Kelly* v. *Tinling* (1865), L. R. 1 Q. B. 699.

[5] *Sir John Carr* v. *Hood* (1808), 1 Camp. 355, n.; *Strauss* v. *Francis* (1866), 4 F. & F. 1107.

[6] *Campbell* v. *Spottiswoode* (1863), 3 B. & S. 769; 32 L. J. Q. B. 185; *Davis* v. *Duncan* (1874), L. R. 9 C. P. 396.

[7] *Per cur.* in *Davis* v. *Shepstone* (1886), 11 App. Cas. at p. 190.

(*c*) The limits of a fair comment are very wide. They are defined, with all possible precision and with due regard to the liberty of the Press, by Lord Esher, M. R., in his admirable judgment in *Merivale* v. *Carson*[3]:—"Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this: Would any fair man, however exaggerated or obstinate his views, have said that which this criticism has said?" Lord Justice Bowen concurred with the Master of the Rolls; and the same view was expressed by the Court of Appeal in *McQuire* v. *Western Morning News*.[4] These cases establish that it does not matter whether the jury would or would not have themselves expressed the same opinion on the facts.

(*d*) The word "fair" in the phrase "a fair comment" refers to the language employed, and not to the mind of the writer. Hence it is possible that a fair comment may be published maliciously, and, if it is, an action will lie.[1]

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[1] *Campbell* v. *Spottiswoode, suprà; Mangena* v. *Wright,* [1909] 2 K. B. 958.

[2] *Hunt* v. *The Star Newspaper Co.*, [1908] 2 K. B. 309. As to the difference between a plea of justification and a plea of fair comment, see *Digby* v. *The Financial News,* [1907] 1 K. B. 503; *Dakhyl* v. *Labouchere,* [1908] 2 K. B. 325; *Arnold & Butler* v. *Bottomley and others,* [1908] 2 K. B. 151.

[3] (1887), 20 Q. B. D., at pp. 280, 281.

[4] [1903] 2 K. B. 109. See specially the judgment of Collins, M. R. In a subsequent case, *Dakhyl* v. *Labouchere,* [1908] 2 K. B. 325, Lord Atkinson unfortunately made use of the expression "It is for the jury to determine whether in that particular case the inference ought to be drawn" (p. 329); and this *dictum* was regarded by Moulton, L. J., in *Hunt* v. *The Star Newspaper Co.*, [1908] 2 K. B. 309, and by Scrutton, J., in *Homing Pigeon Publishing Co.* v. *Racing Pigeon Publishing Co.* (1913), 29 Times L. R. 389, as establishing that the jury must be satisfied that the defendant's comment was the proper and correct one. But this, it is submitted, is contrary to the well-known and established rule of law on the subject.

PRIVILEGE.

There are occasions on which it is a man's duty to state his real opinion fully and frankly, without thought or fear of consequences. To some of such occasions due regard for the public service or the administration of justice requires that an "absolute" privilege should attach, and a complete immunity be afforded to the speaker or writer: no action against him is permitted, even though it be alleged that he knew his words to be false and spoke or wrote them with deliberate spite. There are not many such occasions, and the Courts will not increase the number.[2]

> The real ground on which the doctrine of "absolute privilege" rests "is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious."[3]

There is, however, a much larger class of occasions on which the privilege is a "qualified" one; occasions on which it is the right or duty of the defendant to state what he honestly believes to be the truth about the plaintiff, but on which the interests of society do not require that he should be free from all responsibility. In such cases the plaintiff will recover damages in spite of the privilege, if he can prove that the defendant did not act in good faith, but was actuated by some improper motive in making the statement complained of. This improper motive is called "malice."[4]

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[1] *McQuire* v. *Western Morning News*, [1903] 2 K. B. 100; *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B. 292; *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B. 627; *Lever* v. *Associated Newspapers*, [1907] 2 K. B. 626.

[2] *Per cur.* in *Stevens* v. *Sampson* (1879), 5 Ex. D. at p. 55.

[3] *Per* Channell, J., in *Bottomley* v. *Brougham*, [1908] 1 K. B. at p. 587.

[4] *Clark* v. *Molyneux* (1877), 3 Q. B. D. at p. 246.

It is for the defendant to satisfy the judge that the occasion is privileged; when this is done, it is for the plaintiff to prove malice.

ABSOLUTE PRIVILEGE.

The cases in which absolute immunity is granted may be grouped under three heads:—

(i.) *Parliamentary Proceedings.*—No member of either House of Parliament is in any way responsible in a Court of justice for anything said in the House;[1] but this privilege does not extend outside the walls of the House and will not, therefore, cover the repetition of anything spoken in the House. A petition to Parliament, or to a committee of either House, is absolutely privileged, although it contains false and defamatory statements. So is all evidence given before a committee of either House. Parliamentary papers published by the authority of either House are protected by a special statute;[2] and all proceedings, civil or criminal, brought for any libellous matter contained in such parliamentary papers are to be stayed upon delivery of a certificate, properly verified by affidavit, setting forth that they were published by the order and under the authority of Parliament.

(ii.) *Judicial Proceedings.*—No action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any Court of competent jurisdiction. Public policy demands that a judge on the bench, a counsel at the bar, a witness in the box, shall be able to speak his mind fully without fear of consequences. A judge of the superior Court has an absolute immunity, *i.e.*, an immunity which cannot be destroyed by the clearest proof of actual malice.[3] A judge of an inferior Court enjoys the same privilege, provided he is not acting outside his jurisdiction.[4] A justice of the peace enjoys the same immunity. No action will lie against him for defamatory words, even though spoken maliciously and without reasonable or probable cause, provided they arise out of any matter properly before him.[1] The same privilege covers speeches made by counsel, or by a solicitor acting as advocate,[2] or by a litigant in person,[3] and all statements made by witnesses in the box.[4] Similarly, all documents are privileged which are necessary to the preparation for or the conduct of litigation, provided the proceeding is, or is pending, before a Court of competent jurisdiction, and the publication is made at a proper time and place,[5] *e.g.*, a report properly made by an official receiver in the course of his duty in liquidation proceedings.[6]

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[1] Bill of Rights, 1 Will. & Mary, st. 2, c. 2; *Dillon* v. *Balfour* (1887), 20 L. R. Ir. 600.

[2] 3 & 4 Vict. c. 9; and see *Stockdale* v. *Hansard* (1839), 9 A. & E. 1; 11 *Ib.* 253, 297.

[3] *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668.

[4] *Houlden* v. *Smith* (1850), 14 Q. B. 841; *Scott* v. *Stansfield* (1868), L. R. 3 Ex. 220; *Tughan* v. *Craig*, [1918] 1 I. R. 245.

The privilege extends to Courts-martial, and protects any communication made either to the Court or before the Court is held with a view to assisting the Court;[7] it also attaches to all proceedings of, and to all evidence given before, any statutory tribunal which, though not strictly a Court, exercises judicial functions, and also to all such preliminary steps as are in accordance with the recognised and reasonable procedure of that tribunal.[8] The Discipline Committee of the Law Society is such a tribunal;[9] so is the General Medical Council;[10] but a county council is not,[11] nor is the general annual meeting of licensing justices.[12]

(iii.) *Acts of State.*—A similar immunity, resting also on obvious grounds of public policy, is accorded to every official statement made and every official letter written by an officer of the State in the course of the performance of his official duty. Malice is thus immaterial.[13] This absolute privilege extends to all acts of State and to the official notification of such acts in the *London Gazette*, to all State papers, and to all advice given to the Crown by its ministers or ambassadors.[1]

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[1] *Law* v. *Llewellyn*, [1906] 1 K. B. 487. And see *ante*, pp. 418—420.

[2] *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.

[3] *Hodgson* v. *Scarlett* (1818), 1 B. & Ald. 232.

[4] *Seaman* v. *Netherclift* (1876), 1 C. P. D. 540; 2 C. P. D. 53.

[5] *Watson* v. *McEwan*, [1905] A. C. 481.

[6] *Burr* v. *Smith and others*, [1909] 2 K. B. 306.

[7] *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744.

[8] See, for instance, *Hodson* v. *Pare*, [1899] 1 Q. B. 455; *Barratt* v. *Kearns*, [1905] 1 K. B. 504; and *Copartnership Farms* v. *Harvey-Smith*, [1918] 2 K. B. 405.

[9] *Lilley* v. *Roney* (1892), 61 L. J. Q. B. 727.

[10] *Allbutt* v. *General Medical Council* (1889), 23 Q. B. D. 400.

[11] *Royal Aquarium, &c., Society* v. *Parkinson*, [1892] 1 Q. B. 431.

[12] *Attwood* v. *Chapman*, [1914] 3 K. B. 275.

[13] *Chatterton* v. *Secretary of State for India in Council*, [1895] 2 Q. B. 189; *Salaman* v. *Secretary of State for India in Council*, [1906] 1 K. B. 613.

QUALIFIED PRIVILEGE.

Occasions of qualified privilege, *i.e.*, privilege which can be rebutted by proof of actual malice, may be grouped under two heads :—

I. Privilege arising from Duty or Interest.
II. Privileged Reports.

Privilege arising from Duty or Interest.

The guiding principle, by which such privileged occasions may be ascertained, has been laid down as follows :—" A communication made *bonâ fide* upon any subject-matter, in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty. And the word 'duty' cannot be confined to legal duties, which may be enforced by indictment, action or *mandamus*, but must include moral and social duties of imperfect obligation."[2] Both the person making the communication and the person receiving it must have either an interest in the subject-matter of the communication, or some duty to discharge in connection with it.

Let us apply this rule to special cases :—

(i.) *Answers to Confidential Inquiries.*—" If a person who is thinking of dealing with another in any matter of business asks a question about his character from some one who has means of knowledge, it is for the interests of society that the question should be answered ; and the answer is a privileged communication."[3]

The commonest instance of this is the " character " of a servant given by a former master to some one with whom the servant is seeking employment. Such a communication is held privileged, because it is for the advantage of the public, and of honest servants generally, that character should be freely given. Even though the statement complained of as defamatory should be untrue in fact, the master will be held justified by the occasion in making that statement, unless it can be proved that he made it maliciously, as, for example, if the plaintiff can show that the defendant knew that his statement was untrue when he made it.

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[1] *Dawkins* v. *Lord Rokeby, suprà; Grant* v. *Secretary of State for India* (1877), 2 C. P. D. 445 ; *Att.-Gen. of the Cape of Good Hope* v. *Van Reenen*, [1904] A. C. 114 ; and see *Adam* v. *Ward*, [1917] A. C. 309.

[2] *Per* Lord Campbell, C. J., in *Harrison* v. *Bush* (1855), 5 E. & B. at pp. 348, 349.

[3] *Per* Brett, L. J., in *Waller* v. *Loch* (1881), 7 Q. B. D. at p. 622.

The same rule applies whenever a confidential inquiry is made as to the competency and skill of a professional man, or as to the solvency of a tradesman. No privilege, however, attaches where the answer is given, not in the general interests of society or from a sense of duty, but by a trade protection society or other mercantile agency from motives of self-interest and as a matter of business.[1]

(ii.) *Communications volunteered.*—There are some cases in which it is the duty of the defendant unasked and of his own accord to give information to his friend or neighbour, or sometimes even to a stranger, *e.g.*, where a confidential relationship exists between the parties, or where a complaint as to the conduct of some public official is made to his superior officer. The rule in such cases is thus laid down:—"Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he *bonâ fide* and without malice does tell them, it is a privileged communication."[2] But it is often difficult to apply this rule.[3] The test in every case is this: Assume in the defendant's favour that the circumstances really were such as he honestly believed them to be; then, in those circumstances, did he act as an honest man would feel himself bound to act? If so, the privilege attaches to anything he said or wrote; but if the jury are persuaded that he went beyond such limits, he must suffer for his interference.

(iii.) *Communications made in self-defence.*—If the communication complained of was made by the defendant to protect his private interests or to answer some attack made by the plaintiff, it is privileged provided it was made to one who has some interest in the matter or some duty to perform.[1] Any one who honestly believes he has a grievance is entitled to seek redress in the proper quarter.[2] But he must apply to a person who has some duty or interest in the matter. It is not sufficient that the defendant honestly believed that such person had jurisdiction.[3]

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[1] *Macintosh* v. *Dun*, [1908] A. C. 390; *Greenlands* v. *Wilmshurst*, [1913] 3 K. B. 507; [1916] 2 A. C. 15.

[2] *Per* Blackburn, J., in *Davies* v. *Snead* (1870), L. R. 5 Q. B. at p. 611.

[3] Contrast *Coxhead* v. *Richards* (1846), 2 C. B. 569, with *Bennett* v. *Deacon*, *Ib.* 628; and *Clark* v. *Molyneux* (1877), 3 Q. B. D. 237, with *Stuart* v. *Bell*, [1891] 2 Q. B. 341.

(iv.) *Communications based on Common Interest.*—When two or more persons have a legitimate common interest in any matter, all communications passing between them with reference to that matter are privileged, *e.g.*, communications between partners, co-executors or co-trustees, two creditors of the same debtor, two directors of the same company or ratepayers of the same parish.[4]

Privileged Reports.

Reports of judicial and parliamentary proceedings—if fair and accurate—are privileged at common law, because it is a benefit to the public to be accurately informed as to such proceedings. The Newspaper Libel and Registration Act, 1881,[5] and the Law of Libel Amendment Act, 1888,[6] conferred a like qualified privilege upon reports of public meetings.

(i.) *Reports of Judicial Proceedings.* — Every fair and accurate report of any proceeding in a Court of law is privileged, unless the Court has itself prohibited the publication, or the subject-matter of the trial is unfit for publication.[7] This is so, even where an application is made to the Court *ex parte.*[8] "The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to private persons whose conduct may be the subject of such proceedings."[9] If the case lasts more than one day, reports may be published separately of each day's proceedings, though all comment must be reserved till the trial is over.[1] The report may be abridged or condensed; it is sufficient to publish a fair abstract. But if the evidence even of one important witness be wholly omitted, the jury will probably deem the report unfair.[2] Privilege otherwise attaching to a fair and accurate report will be destroyed, if a sensational and misleading headline be prefixed.

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[1] *Blackham* v. *Pugh* (1846), 15 L. J. C. P. 290; *Laughton* v. *Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495; *Baker* v. *Carrick,* [1894] 1 Q. B. 838.

[2] *Jenoure* v. *Delmege,* [1891] A. C. 73.

[3] *Hebditch* v. *MacIlwaine,* [1894] 2 Q. B. 54.

[4] *Spill* v. *Maule* (1869), L. R. 4 Ex. 232; *Hunt* v. *G. N. Ry. Co.*, [1891] 2 Q. B. 189.

[5] 44 & 45 Vict. c. 60.

[6] 51 & 52 Vict. c. 64.

[7] *Steele* v. *Brannan* (1872), L. R. 7 C. P. 261.

[8] *Usill* v. *Hales* (1878), 3 C. P. D. 319; *Kimber* v. *The Press Association, Ltd.*, [1893] 1 Q. B. 65.

[9] *Per* Lawrence, J., in *R.* v. *Wright* (1799), 8 T. R. at p. 298.

(ii.) *Reports of Parliamentary Proceedings.*—It is now clear law that a fair and accurate report of any proceeding in either House of Parliament, or in a parliamentary committee, is privileged, although it contain matter defamatory of an individual.[3]

(iii.) *Reports of the Proceedings of a Public Meeting.*—At common law no reports, other than reports of judicial or parliamentary proceedings, were privileged.[4] But by section 4 of the Law of Libel Amendment Act, 1888,[5] the privilege was extended to "a fair and accurate report published in any newspaper of the proceedings of a public meeting," or of any meeting (except where neither the public nor any newspaper reporter is admitted) of certain bodies, including vestries, town councils, boards of guardians and all other local authorities constituted by Act of Parliament. Such report is privileged, provided that—

(a) it is not made or published maliciously;

(b) it contains no blasphemous or indecent matter;

(c) it contains no matter which is "not of public concern and the publication of which is not for the public benefit."

And even then the privilege will be lost if the defendant was requested and has refused to insert in his paper "a reasonable letter or statement by way of contradiction or explanation." A public meeting is defined as being "any meeting *boná fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

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[1] *Lewis* v. *Levy* (1858), E. B. & E. 537; 27 L. J. Q. B. 282; *MacDougall* v. *Knight and Son* (1886), 17 Q. B. D. 636; (1889), 14 App. Cas. 194.

[2] *Milissich* v. *Lloyds* (1877), 46 L. J. C. P. 404; *Hope* v. *Leng* (1907), 23 Times L. R. 243.

[3] *Wason* v. *Walter* (1868), L. R. 4 Q. B. 73; and see 51 & 52 Vict. c. 64, s. 3.

[4] *Davison* v. *Duncan* (1857), 7 E. & B. 229; *Popham* v. *Pickburn* (1862), 7 H. & N. 891.

[5] 51 & 52 Vict. c. 64. Section 4 also confers privilege on "the publication at the request of any government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public."

It will be observed that the privilege conferred by this section is confined to reports "published in a newspaper;"[1] all reports not "published in a newspaper" remain unprivileged. And the section still leaves it the duty of the editor to edit all reports of public meetings, and excise any matter that is "not of public concern, and the publication of which is not for the public benefit."[2]

Malice.

The defence that the occasion of publication was one of qualified privilege may be rebutted by proof of actual malice in the defendant. Directly the judge rules that the occasion is privileged, the plaintiff must prove malice, or fail in his action. If, however, the judge rules that the occasion is not privileged, it is immaterial, except perhaps as to damages, whether the defendant acted maliciously or not.

> "Malice does not mean malice in law, a term in pleading, but actual malice, . . . a wrong feeling in a man's mind. The defendant is not entitled to protection if he uses the occasion for some indirect and wrong motive. . . . If a man is proved to have stated that which he knew to be false, no one need inquire further. . . . So if it be proved that out of anger or for some other wrong motive the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive."[3]

The existence of malice may be satisfactorily established in a great variety of ways. Thus proof that the defendant had previously libelled the plaintiff would be evidence to show that the defendant was actuated by malice in the particular publication complained of, and that it did not take place through carelessness or inadvertence. Again, malice may in some cases be proved by intrinsic evidence, such as the unwarranted violence of the defendant's language or the unnecessary extent of the publication. That the expressions used are angry is not enough; they must be shown to be malicious. There are occasions on which a man honestly indignant may use strong language without losing his privilege;[1] it is only where the expressions used are wholly unwarranted by the occasion that their violence can be relied on as any proof of malice in the defendant.[2]

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[1] The precise meaning of the word "newspaper" is defined by s. 1 of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60, s. 2).

[2] See *Kelly* v. *O'Malley* (1889), 6 Times L. R. 62; and *Chaloner* v. *Lansdown and Sons* (1894), 10 Times L. R. 290.

[3] *Per* Brett, L. J., in *Clark* v. *Molyneux* (1877), 3 Q. B. D. at pp. 246, 247.

If the defendant intentionally publishes defamatory words to persons who are outside the privilege, the defence is rebutted; but the accidental presence of a third person when defamatory words are spoken will not of itself destroy the privilege. Sometimes it is the duty of the defendant to speak out then and there what he believes to be the truth, whoever may be present.[3] There are also occasions on which a person who is about to make grave charges against another is entitled to provide himself with a reliable witness; thus, a master has clearly a right to charge his servant *bonâ fide* with any supposed misconduct in his service, and to admonish and blame him; and the simple circumstance of the master exercising this right in the presence of another will not of necessity take away from him the protection of the law. Should it, however, appear in evidence that an opportunity had been sought for making such charge before third persons when it might have been made in private, this fact alone would be strong proof of a malicious intention, which would destroy all privilege.[4]

Where the occasion of publication is privileged and the circumstances are shown by the evidence to be equally consistent with either the presence or the absence of malice, the plaintiff will fail in his action; for he has not proved malice. If, however, at the close of the plaintiff's case there is any evidence which would warrant the jury in inferring actual or express malice, the judge cannot withdraw the case from them. Only the jury can find that there was malice in the defendant; all that the judge can do is to rule, in a proper case, that there is no evidence of malice to go to the jury.[1]

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[1] *Spill* v. *Maule* (1869), L. R. 4 Ex. 232.

[2] *Fryer* v. *Kinnersley* (1863), 15 C. B. N. S. 422.

[3] *Pittard* v. *Oliver*, [1891] 1 Q. B. 474.

[4] *Somerville* v. *Hawkins* (1851), 10 C. B. 590; *Hunt* v. *G. N. Ry. Co.*, [1891] 2 Q. B. 189.

Proof that the defendant was actuated by malice will destroy the defence of fair comment, as well as that of qualified privilege; but it does not in the least affect the validity of the plea that the words are true. On the other hand, proof that the words are untrue will not destroy either the defence of privilege or that of fair comment, unless it be further shown that the defendant knew or ought to have known that his words were false.

In addition to awarding the plaintiff damages, the Court has jurisdiction to restrain by injunction the publication of a libel. But such an injunction will not be granted before the trial, except in the clearest cases. Thus, an interlocutory injunction will only be granted where, if a jury did not find the matter libellous, the Court would set aside the verdict as unreasonable; and not even then, if the occasion of publication be privileged,[2] or if the defendant has pleaded or intends to plead a justification, and there is any reasonable prospect of his proving the words true.[3]

Words Causing Damage.

So far we have dealt with words which are defamatory, *i.e.*, words which have injured the reputation of the plaintiff, either personally or in the way of his profession or trade. But as a general rule an action will lie against any one who has without just cause or excuse published any words which are untrue, if their publication has caused the plaintiff pecuniary loss. This is so, although the words are not defamatory, so that no action of libel or slander will lie. A man may deny the plaintiff's title to certain property, or disparage the goods which he makes or sells, without casting any slur on his moral character or professional skill; and such words will in certain circumstances be actionable. The action will not be one of defamation: it is "an action on the case" for maliciously acting in such a way as to inflict loss on the plaintiff. "To support such an action it is necessary for the plaintiffs to prove that the statements complained of were untrue; that they were made maliciously, *i.e.*, without just cause or excuse; and that the plaintiffs have suffered special damage thereby."[1] "However they may be described technically, they are actions for unlawfully causing damage. The damage is the gist of the action."[2]

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[1] *Somerville* v. *Hawkins* (1851), 10 C. B. 590.

[2] *Quartz Hill, &c., Co.* v. *Beall* (1882), 20 Ch. D. 501.

[3] *Bonnard* v. *Perryman*, [1891] 2 Ch. 269; *Monson* v. *Tussaud*, [1894] 1 Q. B. 671.

Such an action differs from an ordinary action of libel and slander in many important respects:—

1. The words are not defamatory: they do not disparage the plaintiff's moral character, his solvency, his professional skill or his business capacity: they are merely an attack on some thing, or on his title to some thing.

2. The words will be equally actionable whether written or spoken.[3]

3. Special damage must in all cases be proved to entitle the plaintiff to recover; he cannot even obtain an injunction, it would seem, without proving that he has already sustained some pecuniary loss.[4] Thus where the defendants published in a newspaper that the plaintiff's house was haunted, the Court of Appeal directed judgment to be entered for the defendants upon the ground that there was no evidence of special damage.[5]

4. There is no presumption that the words are untrue; the *onus* therefore lies on the plaintiff to prove them untrue.

5. Malice will not be presumed; the plaintiff therefore must give some *primâ facie* evidence that the defendant acted maliciously, or at all events that he acted without lawful occasion or reasonable cause.

6. A right of action for defamatory words dies with the person defamed; but an action in the nature of slander of

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[1] *Per* Lord Davey in *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 Rep. Pat. Cas. at p. 99.

[2] *Per* Lord Halsbury, L. C., *ib.* at p. 104; and see *Concaris* v. *Duncan*, [1909] W. N. 51.

[3] See *Ratcliffe* v. *Evans*, [1892] 2 Q. B. at p. 532.

[4] *White* v. *Mellin*, [1895] A. C. 154, 163, 167; *Royal Baking Powder Co.* v. *Wright, Crossley & Co.*, *suprà*.

[5] *Barrett* v. *Associated Newspapers* (1907), 23 Times L. R. 666; and see *Lyne* v. *Nicholls* (1906), 23 Times L. R. 86.

title survives to his executors to the extent that any damage can be shown to the estate of the deceased.[1]

It is quite possible, however, that the same words may give rise to an action of both kinds. An attack upon a thing may also be an indirect attack upon the owner of that thing or some other individual who is immediately connected with it. Thus to impute that the goods which the plaintiff sells or manufactures are to his knowledge worthless or adulterated is a distinct charge against the plaintiff of fraud and dishonesty in his trade.[2] In a proper case the plaintiff may not only recover damages, but also obtain an injunction. It is seldom, however, that an interim injunction is granted.

There has been considerable doubt as to the precise degree of malice necessary to sustain an action for words causing damage; but the law on the point seems now to be fairly well settled. It is not necessary for the plaintiff to prove (unless the occasion be privileged, when he must of course show express malice) that the defendant desired and intended to inflict loss on the plaintiff, or that he was recklessly indifferent whether loss would follow or not. In *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*[3] the Court held that it was sufficient if the words were published "without lawful occasion." And now anything will be evidence of malice which may reasonably lead the jury to infer that the words were published without "justification" or without "just cause or excuse."[4] "The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action."[5]

The mere fact that the plaintiff and the defendant are rivals in the same line of business is by itself no evidence of malice; indeed, it rather tends to negative malice, as it renders it probable that the words were published with the object of promoting the defendant's own trade and not of injuring the plaintiff.[6] "It was not malice if the object of the writer was to push his own business, though at the same time it might incidentally injure another person's business. . . . The mere fact that it would injure another person's business was no evidence of malice."[7]

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[1] *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771.

[2] *Ib.*; *Linotype Co., Ltd.* v. *British Empire &c., Co.* (1899), 81 L. T. 331; 15 Times L. R. 524.

[3] (1874), L. R. 9 Ex. 218.

[4] *Quinn* v. *Leathem*, [1901] A. C. 495; *Giblan* v. *National Amalgamated, &c.*, [1903] 2 K. B. 600; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239.

[5] *Per* Maule, J., in *Pater* v. *Baker* (1847), 3 C. B. at p. 868.

[6] *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25; *Allen* v. *Flood*, [1898] A. C. 1.

[7] *Per* Collins, M. R., in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Maison Talbot and others* (1904), 20 Times L. R. at p. 581. And see *White* v. *Mellin*, [1895] A. C. at p. 164.

Actions of this kind may be grouped under three heads :—

1. Slander of title.

2. Words which disparage the goods manufactured or sold by another.

3. Other words which have occasioned loss to the plaintiff.

1. *Slander of Title.*

This term is usually employed to include all statements, whether written or spoken, which impeach a man's title to any property. Such words clearly do not affect his reputation; for his character would stand equally high whether he owned that property or not. When the plaintiff possesses property, and any one maliciously comes forward and falsely denies or impugns the plaintiff's title to it, an action lies to recover any damage thereby caused to the plaintiff. It makes no difference whether the defendant's words be spoken, written or printed, save as affecting the amount of damages. The property may be either real or personal; and the plaintiff's estate or interest in it may be either in possession or reversion. It need not be even a vested interest, so long as it is anything that is saleable or that has a market value.

The words must be false; if there be such a flaw in the plaintiff's title as the defendant asserts, no action lies. Next the statement must be malicious; if it be made in the honest assertion of the defendant's own right—real or supposed—to the property, no action lies. But whenever a man unnecessarily intermeddles in the affairs of others with which he has no concern, such officious interference will be deemed malicious and he will be liable, if damage follow. Lastly, special damage must be proved and shown to have arisen from the defendant's words. And for this purpose it is generally necessary for the plaintiff to prove that he was in the act of letting or selling his property, and that the defendant by his words prevented an intending tenant or purchaser from taking a lease or completing the purchase. The special damage must always be such as naturally or reasonably arises from the use of the words.[1]

[1] *Haddan* v. *Lott* (1854), 15 C. B. 411.

But a man may always assert any right of his own or of his master or client, which at the time he honestly believes to exist.[1] Hence whenever a man claims a right or title in himself, it is not enough for the plaintiff to prove that he had no such right; he must also attempt to show that the defendant could not honestly have believed in the existence of the right claimed, or at least that he had no reasonable or probable cause for so believing.[2] If there appear no reasonable or probable cause for his claim of title, still the jury are not bound to find malice; the defendant may have acted stupidly, yet from an innocent motive. But if he knew at the time that his claim was groundless, the jury will rightly deem his interference malicious.[3]

2. *Words which Disparage the Goods Manufactured or Sold by Another.*

In *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*,[4] Bramwell, B., laid down "the general principle," that "an untrue statement, disparaging a man's goods, published without lawful occasion and causing him special damage, is actionable." But this proposition is too wide. Not every such statement is actionable. A man may always puff his own goods. He may even name his rivals in the trade, compare his goods with theirs and assert that his own goods are better than theirs, either generally or in some particular respect. No action will lie for such expressions of opinion so long as the defendant asserts nothing as a fact about his rivals' goods. But if a man, after lauding his own goods and expressing his opinion that they are superior to the goods manufactured by others, goes on to make assertions of fact about his rivals' goods, which are proved to be untrue, such disparagement will give rise to an action on the case, provided the words be published without just cause or occasion, and special damage ensue; *e.g.*, if he asserted falsely that the plaintiff's goods contain harmful ingredients.

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[1] *Pater* v. *Baker* (1847), 3 C. B. 831; *Steward* v. *Young* (1870), L. R. 5 C. P. 122; *Baker* v. *Carrick*, [1894] 1 Q. B. 838; *Dunlop Pneumatic Tyre Co., Ltd.* v. *Maison Talbot and others* (1904), 20 Times L. R. 579.

[2] *Smith* v. *Spooner* (1810), 3 Taunt. 246.

[3] *Atkins* v. *Perrin* (1862), 3 F. & F. 179.

[4] (1874), L. R. 9 Ex. at p. 222.

Competition between rival traders is allowed to any extent, so long as only lawful means are resorted to. But force and violence must not be used, nor threats nor imputations of fraud or dishonesty. The special damage must of course be the necessary or natural consequence of the defendant's words; and this implies that the words must be such as are capable of injuring the plaintiff in his business.

The defendant published a certificate by a Dr. Muspratt, who had compared the plaintiffs' oil with the defendant's and deemed it inferior to the defendant's. It was alleged that the certificate was false, and that divers customers of the plaintiffs after reading it had ceased to deal with the plaintiffs and gone over to the defendant. It was held that no action lay, for the plaintiffs' oil, even if inferior to the defendant's, might still be very good.[1]

The defendants falsely and without lawful occasion published a detailed analysis of the plaintiffs' artificial manure and of their own, and stated that the plaintiffs' manure appeared to contain a considerable quantity of coprolites and was altogether an article of low quality. Special damage having resulted, it was held that the action lay.[2]

The plaintiffs manufactured and sold (to the defendant among others) a "Food for Infants." The defendant affixed to bottles of the plaintiffs' food a label to the following effect:—"*Notice.* The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. . . . Local Agent, Timothy White, chemist, Portsmouth." It was held that for such disparagement no action lay.[3]

It is also not actionable for a dealer in pianos to advertise that he is selling pianos manufactured by the plaintiff at a price which is really below cost price; for a dealer may offer the goods which he has in stock for sale at whatever price he pleases, and the Court will not inquire into his motives for selling them so cheaply.[4]

3. *Other Words which have occasioned Loss to the Plaintiff.*

There are many cases in which words may produce damage to the plaintiff in his business without in any way affecting either his personal or his professional reputation, or impeaching his title to any land or thing, or disparaging the goods he manufactures or sells. Any statement, whether written or spoken, which is clearly calculated to injure the plaintiff in his business, and which has in fact injured his business and caused him pecuniary loss, may be ground for an action for damages. Such a statement may assert that the goods which the plaintiff offers for sale are not what he represents them to be, or that they are an infringement of somebody's patent or copyright[1]; or it may urge people to bring actions against the plaintiff, or warn them not to deal with him, or not to pay him money due to him, or assert that he has given up business.[2] If any such words be spoken falsely and without reasonable cause, and have in fact injured the plaintiff in his trade, they will be actionable.

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[1] *Young and others* v. *Macrae* (1862), 3 B. & S. 264.

[2] *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.* (1874), L. R. 9 Ex. 218.

[3] *White* v. *Mellin,* [1895] A. C. 154. See also ***Hubbuck*** v. ***Wilkinson,*** [1899] 1 Q. B. 86; *Alcott* v. *Millar's Karri and Jarrah Forests, Ltd.* (1904), 21 Times L. R. 30; *Lyne* v. *Nicholls* (1906), 23 Times L. R. 86; and the discussion of the cases in Odgers on Libel and Slander, 5th ed., pp. 89—91.

[4] *Ajello* v. *Worsley,* [1898] 1 Ch. 274.

There are also words which do not affect a man's reputation, profession or trade, but which nevertheless may cause him special damage. There is authority for holding that if such words are written or spoken by the defendant with the malicious intention of injuring the plaintiff, and the contemplated injury follows as the direct result of the defendant's words, an action on the case will lie whatever be the nature of the words which the defendant employed. Whether an action on the case will also lie for such words if they were written or spoken without lawful occasion and have caused damage which is the natural and necessary consequence of their publication, although the defendant never designed or intended that such a result should follow, is at present not clear law.[3]

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[1] As to the position of a patentee who has issued such circulars or notices, see s. 36 of the Patents and Designs Act, 1907 (7 Edw. VII. c. 29), formerly s. 32 of the Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).

[2] *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524.

[3] See, however, *Green* v. *Button* (1835), 2 Cr. M. & R. 707; *Barley* v. *Walford* (1846), 9 Q. B. 197; *Dixon* v. *Holden* (1869), L. R. 7 Eq. 492; *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34; *Riding* v. *Smith* (1876), 1 Ex. D. at pp. 94, 96; *Green* v. *Archer* (1891), 7 Times L. R. 542; *Newton* v. *Amalgamated Musicians' Union* (1896), 12 Times L. R. 623; *Wilkinson* v. *Downton*, [1897] 2 Q. B. 57; *Leathem* v. *Craig and others*, [1899] 2 Ir. R. 667; *Janvier* v. *Sweeney*, [1919] 2 K. B. 316.

CHAPTER X.

MALICIOUS PROSECUTION, &C.

IN most actions of tort, the motive which actuated the defendant is immaterial; it is enough that he either intentionally or negligently did the act complained of. But in the class of actions which we are now approaching, the state of the defendant's mind at the time when he did the act is most important; the plaintiff cannot succeed unless he can show either guilty knowledge or some wicked or indirect motive in the defendant. Chief among these are actions for malicious prosecution.

It has been already stated as a general principle of the common law that an action lies whenever one man puts the process of the law in motion against another maliciously and without reasonable and probable cause.[1] We have already dealt with the action for malicious arrest, which is one instance of the application of this general principle; another is the action for malicious prosecution.

To succeed in this action, the plaintiff must prove:—

(i.) that the defendant instituted criminal proceedings against him before a judicial officer;

(ii.) that in so doing he acted without reasonable and probable cause;

(iii.) that in so doing he acted maliciously; and

(iv.) that the proceedings terminated in the plaintiff's favour.

The question whether there was or was not an absence of reasonable and probable cause is for the judge; all the other issues are for the jury, if there be any evidence to go to them.

It is not necessary, in order to succeed in an action for malicious prosecution, for the plaintiff to prove that he has suffered any special pecuniary loss through the conduct of the defendant. The unwarranted charge brought against him of criminal misconduct must of itself injure his reputation; it may have led to an arrest, for which he would be entitled to further compensation. In either case, the plaintiff has probably been put to expense in connection with his defence, either for counsel, solicitor or witnesses, and these expenses he is entitled to recover from the defendant as damages.

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[1] See *ante*, p. 474.

(i.) First, then, the plaintiff must prove the institution of proceedings against him by the defendant. It will not be sufficient for him to show that the defendant merely furnished the authorities with facts, upon which they instituted proceedings.

Thus, where the defendant had merely laid the facts *bonâ fide* before a magistrate, who erroneously treated the matter as a felony whereas it was in reality only a civil injury and issued a warrant for the apprehension of the plaintiff, no action lay against the defendant; he was not responsible for the mistake of the magistrate, and could not therefore be said to have instituted the proceedings.[1] If, however, the defendant laid a formal complaint or information before a magistrate, or signed the charge-sheet at the police station, or instructed a solicitor to prosecute, this will be strong evidence to show that he is responsible for the proceedings. But where the defendant, acting *bonâ fide*, had sworn an information before a magistrate under section 10 of the Criminal Law Amendment Act, 1885,[2] and the magistrate, exercising his judicial discretion, issued a search warrant, it was held that no action for malicious prosecution lay against the defendant; for though he swore the information, he had not "instituted the proceedings."[3]

Where a prosecution is maliciously instituted without reasonable and probable cause by the servant or agent of a company or corporation, an action will lie against the company or corporation, if the servant or agent acted by the authority of his employers or if his act was within the ordinary course of his employment.[4] But where a bank manager without special authority ordered the arrest and prosecution of the plaintiff, it was held that no action lay against the bank; for the manager's act was not within the scope of his authority.[1]

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[1] *Wyatt* v. *White* (1860), 29 L. J. Ex. 193.

[2] 48 & 49 Vict. c. 69.

[3] *Hope* v. *Evered* (1886), 17 Q. B. D. 338; *Lea* v. *Charrington* (1889), 23 Q. B. D. 45, 272. In such cases, moreover, the fact that the magistrate issued the warrant is clear proof that there was reasonable and probable cause for the defendant's action.

[4] *Edwards* v. *Midland Ry. Co.* (1880), 6 Q. B. D. 287; *Cornford* v. *Carlton Bank, Ltd.*, [1899] 1 Q. B. 392; [1900] 1 Q. B. 22; *Citizens' Life Assurance Co., Ltd.* v. *Brown*, [1904] A. C. 423.

(ii.) Next the plaintiff must satisfy the judge "that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause."[2]

In an action for false imprisonment, as we have seen, the burden lies on the defendant to prove affirmatively that the imprisonment was lawful; in an action for malicious prosecution, however, it is for the plaintiff to establish a negative proposition—that there was no reasonable and probable cause for the prosecution. This he must establish to the satisfaction of the judge, who, in order to enable himself to determine this issue, may leave subsidiary questions of fact to the jury, in which case the *onus* of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant rests upon the plaintiff. Thus, for instance, it will be for the jury to say whether the defendant believed in the guilt of the accused; whether he believed in the existence of the facts on which he had acted, and had taken reasonable care to assure himself of their truth; or whether he knew of certain other facts, which afforded an answer to the prosecution.[3] The judge must accept their findings, and then decide whether the facts so found do or do not amount to a reasonable and probable cause for the prosecution.[4]

"There must be, first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused."[1]

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[1] *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270.

[2] *Per* Bowen, L. J., in *Abrath* v. *N. E. Ry. Co.* (1883), 11 Q. B. D. at p. 455; and see *Bradshaw* v. *Waterlow & Sons*, [1915] 3 K. B. 527.

[3] *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167; *Abrath* v. *N. E. Ry. Co.* (1883), 11 Q. B. D. 440; (1886), 11 App. Cas. 247.

[4] *Lister* v. *Perryman* (1868), L. R. 4 H. L. 521. In this case Perryman failed in his action, although Lister had acted on hearsay evidence in instituting the prosecution.

"In order to justify a defendant there must be a reasonable cause, such as would operate on the mind of a discreet man; there must also be a probable cause, such as would operate on the mind of a reasonable man—at all events, such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him." [2]

Thus, where the defendant had prosecuted the plaintiff for perjury and the plaintiff was acquitted, and subsequently in an action for malicious prosecution there was a conflict of evidence on the very point on which the plaintiff was alleged to have committed perjury, the judge directed the jury that, if they were not satisfied which of the parties they should believe, they must find for the defendant, as the plaintiff would, in that case, have failed to show that the defendant had acted without reasonable and probable cause; and it was held on a motion for a new trial that the direction was right.[3]

The belief of the defendant in the guilt of the plaintiff at the time when he instituted the proceedings against him is very material. If he can show that he acted *bonâ fide* and took counsel's opinion on the facts of the case, he has a very strong defence, however erroneous counsel's opinion may prove to be. But if he withholds facts from counsel or purposely obtains the advice of an inexperienced lawyer, he will be liable in an action for malicious prosecution, because he could not have had a *bonâ fide* belief in the guilt of the plaintiff.[4] Malice cannot be inferred from the mere fact that the prosecution failed.[5]

(iii.) Next, the plaintiff must prove that in instituting the proceedings the defendant was actuated by malice. Such malice may consist either of personal ill-will against the plaintiff, or of a general disregard of the right consideration due to all mankind which, though it may not be directed against any one in particular, is nevertheless productive of injury to the plaintiff. Malice may, therefore, be proved in two ways—either by direct evidence of words or general conduct which show ill-feeling towards the plaintiff, or by proof of some act from which a jury would be held justified in inferring a malicious motive—and this act may be one not aimed at the particular individual who has suffered by it.

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[1] *Per cur.* in ***Hicks* v. *Faulkner*** (1878), 8 Q. B. D. at pp. 171, 172.

[2] *Per* Tindal, C. J., in *Broad* v. *Ham* (1839), 5 Bing. N. C. at p. 725, quoted with approval by Lord Hatherley, L. C., in *Lister* v. *Perryman* (1873), L. R. 4 H. L. at p. 530.

[3] *Hicks* v. *Faulkner* (1878), 8 Q. B. D. 167.

[4] *Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693.

[5] *Corea* v. *Peiris*, [1909] A. C. 549.

The allegation of the want of probable cause "must be substantively and expressly proved, and cannot be implied. From the want of probable cause malice may be, and most commonly is, implied; the knowledge of the defendant is also implied. From the most express malice the want of probable cause cannot be implied. A man from a malicious motive may take up a prosecution for real guilt, or he may, from circumstances which he really believes, proceed upon apparent guilt; and in neither case is he liable to this kind of action."[1] "It is true that in order to support such an action there must be a concurrence of malice in the defendant and want of probable cause. Malice alone is not sufficient, because a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution. On the other hand, the substantiating the accusation is not essential to exonerate the accuser from liability to an action, for he may have had good reason to make the charge and yet be compelled to abandon the prosecution by the death or absence of witnesses, or the difficulty of producing adequate legal proof. The law, therefore, only renders him responsible where malice is combined with want of probable cause."[2]

In connection with an action for malicious prosecution or arrest, the term "malice" does not necessarily signify spite or hatred towards an individual; it is sufficient if the defendant was actuated by any improper or indirect motive. "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is a malicious motive."[3] Thus, instituting proceedings against another to forestall or avenge the bringing of an action by him,[4] or to stop the mouth of a witness,[5] or to make an example of one man merely to deter others,[6] are instances of actions brought from indirect and improper motives.

But if the plaintiff fails to establish the absence of reasonable and probable cause, the presence of malice is immaterial. The defendant has done an act which is by itself *primâ facie* lawful in setting the law in motion against a man, whom he had sufficient reason to believe guilty; and the fact that he was actuated by malice in so doing cannot alter the legality of his act.[1]

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[1] This passage is taken from "the Reasons on which the opinion of Lord Mansfield and Lord Loughborough, in the case of *Johnstone* v. *Sutton* (1786), was founded:" see 1 T. R. at pp. 544, 545; affirmed *ib.* 784.

[2] *Per* Tindal, C. J., in *Willans* v. *Taylor* (1829), 6 Bing. at p. 186.

[3] *Per* Alderson, B., in *Stevens* v. *Midland Ry. Co.* (1854), 10 Exch. at p. 356.

[4] *Leith* v. *Pope* (1779), 2 W. Bla. 1326.

[5] *Haddrick* v. *Heslop* (1848), 12 Q. B. 267.

Thus, where the jury found, in answer to specific questions, that the defendant did not take reasonable care to inform himself of the true facts; that he honestly believed in the full charge which he laid before the magistrates; and that he was actuated by malice and indirect motives in the proceedings taken against the plaintiff, the Court of Appeal held that, although the absence of reasonable and probable cause is some evidence from which malice may be inferred, the jury, by their finding as to the honest belief of the defendant, had negatived any such inference and that, in the absence of any other evidence of indirect motive, the finding of malice in the defendant was unsupported.[2]

Even where the defendant has been bound over to prosecute, an action for malicious prosecution will lie, if the plaintiff can prove that, when the defendant made the charge, he acted maliciously and without reasonable and probable cause.[3] And this is so even where the prosecution has been instituted by the order of a county court judge.[4] Again, where any one institutes proceedings with a *bonâ fide* belief in the guilt of the accused, but subsequently facts come to his knowledge which shake or alter that belief, if he nevertheless proceeds with the prosecution, he may be liable, for he ought to have abandoned it directly his opinion changed as to the guilt of the accused.

(iv.) The plaintiff must also prove that the proceedings instituted against him terminated in his favour.[5] Thus, if A. institutes proceedings of a criminal nature against B. and B. is convicted, B. can bring no action for malicious prosecution, until the conviction is quashed. As long as the decision of one Court remains unreversed, no other Court—except on appeal—can take upon itself to say that there was no reasonable and probable cause for the former decision.[6] And this is so where the proceedings, of which the plaintiff complains, were taken in a foreign Court.[7]

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[1] See, for instance, *Corporation of Bradford* v. *Pickles,* [1895] A. C. 587; *Allen* v. *Flood,* [1898] A. C. 1; and *Davis* v. *Mayor, &c., of Bromley,* [1908] 1 K. B. 170; *ante,* pp. 409, 410.

[2] *Brown* v. *Hawkes,* [1891] 2 Q. B. 718.

[3] *Dubois* v. *Keats* (1840), 11 A. & E. 329.

[4] *Fitzjohn* v. *Maokinder* (1861), 9 C. B. N. S. 505.

[5] *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; *The Quartz Hill, &c., Co.* v. *Eyre* (1883), 11 Q. B. D. 674.

[6] *Basébé* v. *Matthews* (1867), L. R. 2 C. P. 684.

[7] *Castrique* v. *Behrens* (1861), 30 L. J. Q. B. 163.

There are other actions of a like nature, in which malice is a necessary ingredient. Thus, an action lies against any one who falsely and maliciously files a petition to make the plaintiff a bankrupt. "Here is falsehood and malice in the defendant, and great wrong and damage done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself. But it is said, this action was never brought before; I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief."[1] But no action for maliciously procuring the bankruptcy of another can be maintained by a bankrupt still undischarged.[2]

So an action will lie, without proof of any special damage, at the suit of a limited company against any one, who maliciously and without reasonable and probable cause presents a petition to wind the company up—but only after the petition has been dismissed.[3]

But it is not actionable for one man to commence in his own name a civil action against another maliciously and without reasonable and probable cause; the only penalty which such a plaintiff incurs is the payment of costs. If, however, one man takes in hand, upholds or assists with money or otherwise a civil action brought by or against another, in which he has no interest, and does so without any lawful cause arising from kindred, affection or motives of charity, he is guilty of maintenance, which is an indictable misdemeanour at common law;[4] and if such maintenance has caused special damage to the person sued (other than the necessity of paying "extra costs"), an action will lie to recover such damage.[5] And this is so even though the action which was "maintained" succeeded.[1] But no action lies for assisting another in a criminal prosecution.[2]

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[1] *Per* Pratt, C. J., in *Chapman* v. *Pickersgill* (1762), 2 Wils. at p. 146; and see *Farley* v. *Danks* (1855), 4 E. & B. 493; *Johnson* v. *Emerson* (1871), L. R. 6 Ex. 329.

[2] *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210.

[3] *The Quartz Hill, &c., Co.* v. *Eyre* (1883), 11 Q. B. D. 674.

[4] See *ante*, p. 206.

[5] *Bradlaugh* v. *Newdegate* (1883), 11 Q. B. D. 1; *Alabaster* v. *Harness*, [1895] 1 Q. B. 339; *Bussy* v. *Amalgamated Society of Railway Servants* (1908), 24 Times L. R. 437; *British Cash, &c., Conveyors, Ltd.* v. *Lamson, &c., Co., Ltd.*, [1908] 1 K. B. 1006. As to extra costs, see *Gundry* v. *Sainsbury*, [1910] 1 K. B. 99, 645.

But an action lies for bringing and prosecuting an action maliciously and without reasonable and probable cause in the name of a third person who is insolvent, "if the party against whom that action is brought sustains an injury; . . . unless an injury be sustained, no such action will lie. If, however, the action had been brought by a solvent plaintiff and had been determined in favour of the defendant, and there had been an adjudication of costs in his favour, he would have sustained no injury and would have had no action against the party who sued him, although without reasonable and probable cause."[3]

So an action lies against a witness for not obeying a *subpœna*, if his absence has directly caused loss to the plaintiff.[4] But, curiously enough, no action lies against a witness who, in the course of a judicial proceeding, has uttered false statements, even though he has done it maliciously and without any reasonable or probable cause, and the plaintiff has suffered damage through the judicial tribunal acting on the evidence.[5] And it has been held with regard to criminal proceedings that a man, against whom a conviction stands unreversed, cannot bring an action against a witness who negligently gave false evidence which caused that conviction.[6]

And again, where a judgment creditor issues execution for money which he knows is not due to him, he will be liable to an action. It is, of course, *primâ facie* lawful for a successful plaintiff to issue execution for the amount of the judgment which he has obtained. But where he takes in execution the debtor's goods for a larger sum than remained due on the judgment, an action will lie if this was done maliciously and without reasonable or probable cause—as, for instance, if he had received various sums in part payment of the judgment, or was in any other way aware that the sum, for which he issued execution, was excessive.[7]

And, as we have already stated,[8] an act which is in itself lawful will not become unlawful merely because it is done maliciously; though, if an act be *primâ facie* unlawful, the presence of malice in the defendant's mind will, of course, destroy any defence in which *bona fides* is an essential ingredient, and generally also the defence that his act was inadvertent or accidental.

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[1] *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A. C. 368.

[2] *Grant* v. *Thompson* (1895), 72 L. T. 264.

[3] *Per* Jervis, C. J., in *Cotterell* v. *Jones and another* (1851), 21 L. J. C. P. at p. 6; approved in *Coondoo* v. *Mookerjee* (1876), 2 App. Cas. 186.

[4] *Couling* v. *Coxe* (1848), 6 C. B. 703. As to disobeying a *subpœna duces tecum*, see *R.* v. *Llanfaethly* (1853), 2 E. & B. 940.

[5] See *Revis* v. *Smith* (1856), 18 C. B. 126.

[6] *Bynoe* v. *Bank of England*, [1902] 1 K. B. 467.

[7] *De Medina* v. *Grove* (1846), 10 Q. B. 152; *Tancred* v. *Leyland* (1851), 16 Q. B. 669; *Churchill* v. *Siggers* (1854), 3 E. & B. 929.

[8] See *ante*, pp. 409, 410, 550.

CHAPTER XI.

FRAUDULENT MISREPRESENTATION.

"A MERE lie, thrown out at random without any intention of hurting anybody, but which some person was foolish enough to act upon," will not support an action of deceit, for the intention with which the misrepresentation was made is an essential part of the right of action.[1] But any conscious misrepresentation, whether of fact or of law, will be sufficient, if the person to whom it was made was intended to act upon it and did so to his loss. Simple fraud gives no cause of action, unless the plaintiff can show that he has thereby suffered damage. It is immaterial whether the defendant has benefited by his fraud or not.

Negligence is not fraud. Hence, if a statement be made which is in fact untrue and the jury are satisfied that its assertion was the result of inadvertence and not of fraud, no action for damages will lie at common law;[2] though the directors of a projected company have by statute been made liable for false statements, which they have negligently inserted in a prospectus and thereby induced the public to take shares in the company.[3]

In order, then, to succeed in an action for a fraudulent misrepresentation, the plaintiff must prove:—

(i.) that the defendant made representations as to some existing fact

(ii.) with the intention of inducing the plaintiff to act upon them;

(iii.) that such representations were false in fact

(iv.) to the knowledge of the defendant;

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[1] *Per* Ashurst, J., in *Pasley* v. *Freeman* (1789), 2 Sm. L. C., 12th ed. at p. 84.

[2] *Derry* v. *Peek* (1889), 14 App. Cas. 337; *Le Lièvre* v. *Gould*, [1893] 1 Q. B. 491.

[3] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 84, re-enacting the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64).

(v.) that such representations induced the plaintiff to take certain action; and

(vi.) that the plaintiff has thereby suffered damage.

The representations must be made either by the defendant himself or by some agent whom he has duly authorised in that behalf; and they must be made either to the plaintiff himself, or to some third person with the intention and desire that he should repeat them to the plaintiff. The action, which the plaintiff is induced to take in reliance upon such representations, may be of any kind which causes him damage; but it very often is the entering into a contract. If the plaintiff be induced to enter into a contract by a misrepresentation which is innocently and not fraudulently made, he is entitled to have the contract rescinded if he applies for such relief in time,[1] but he is not entitled to recover any damages. Damages are the penalty of deceit.

That the defendant acted fraudulently will give no ground of action to a plaintiff, unless the damage which he has suffered is the direct consequence of the defendant's fraudulent act; it must, as a rule, be either a natural and necessary consequence of his words or a result which he himself contemplated at the time when he made the representation. Whenever A. fraudulently makes a representation which is false, and which he knows to be false, to B., meaning that B. shall act upon it, and B., believing it to be true, does act upon it and thereby sustains damage, A. will be liable to an action for damages at suit of B.[2]

If A. gives B. a good character for honesty and B. by means of that character obtains a situation in C.'s warehouse and subsequently embezzles C.'s money, A. will not be responsible for this loss, unless he knew that what he wrote was false and wrote it with the object of obtaining that situation for B.

A defendant who has fraudulently made an untrue statement is, as a rule, only liable to pay damages to those persons to whom he made the statement, or to whom he intended it should be communicated, and whom in either case he intended to act upon it. If one of those persons of his own accord, whether fraudulently or innocently, repeats that statement to others, the originator of the statement will not be liable to those others, unless it can be shown that he intended and desired that his statement should be repeated to them. But if a statement be published in a newspaper with the object of influencing the readers of that paper generally, any one who has read the statement in that newspaper and acted upon it may claim that it was made to him; and he can sue the defendant if he has sustained any loss through the defendant's misrepresentation.[1]

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[1] *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; and see *post*, p. 722.

[2] *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Smith* v. *Chadwick* (1884), 9 App. Cas. 187; *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. 459, 482.

Thus, in the case of a prospectus of an intended company which conceals material facts or contains express misrepresentations of the truth, where the plaintiff receives a copy from the directors or their agents inviting him to take shares and on the strength of the false statements in it applies to the directors for shares, which are allotted to him and turn out to be worthless, he can recover from the directors the money paid for the shares. It was held in *Peek* v. *Gurney and others*[2] that the proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares; and that when it has performed this office, it is exhausted. But such a prospectus is now, as a rule, very widely circulated and advertised in newspapers, and it must therefore be taken to influence all who read it in the newspapers as well as those to whom it is sent personally by the directors or their agents. Hence, there may be circumstances under which directors will be liable to a person who bought shares in the open market, provided he did so on the faith of the false statements contained in the prospectus, whether he personally received a copy of it or whether he merely saw it in a newspaper.[3]

The main difficulty in the way of a plaintiff, who sues the promoter or a director of a company for a fraud which has caused him damage, is to connect the particular defendant with the fraud complained of, and so make him responsible for its consequences. Sometimes doubtless this may be done directly, *e.g.*, where the defendant has signed prospectuses, has attended and taken part at meetings of the directors or shareholders, or has surreptitiously received moneys belonging to the company. More often, perhaps, the defendant can only be made liable by means of the relation of principal and agent.[1]

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[1] *Gerhard* v. *Bates* (1853), 2 E. & B. 476.

[2] (1873), L. R. 6 H. L. 377; and see *Weir* v. *Barnett and others* (1877), 3 Ex. D. 32; *Weir* v. *Bell and others* (1878), 3 Ex. D. 238.

[3] *Andrews* v. *Mockford,* [1896] 1 Q. B. 372.

But cases frequently occurred in which the directors of a new company, who issued the prospectus, were not aware that the statements which they so issued were untrue. They were misled by the promoters of the company and innocently published the facts and figures laid before them, and were therefore not liable to those who were defrauded by means of such facts and figures. To meet this difficulty an Act was passed, which renders all persons, who authorise the issue of a prospectus or notice, soliciting applications for shares or debentures in a company, liable in certain cases for any untrue statement contained in such prospectus or notice.[2]

Such persons are liable to pay compensation to any one who, on the faith of such prospectus or notice, has subscribed for shares, debentures or debenture stock, and has suffered damage by reason of any untrue statement contained in the prospectus or notice, or in any report or memorandum set out or referred to therein or issued therewith, unless they can prove—

1. that, where the statement does not purport to be made on the authority of an expert or of a public official document or statement, they believed the statement to be true up to the time of allotment; or

2. that, where the statement purports to be made by an expert, or to be contained in what purports to be a copy of or extract from a report or valuation of an engineer, valuer, accountant or other expert, it fairly represented the statement made or was a correct and fair copy or extract, unless they had no reasonable ground for believing that the person making the statement, report or valuation was competent to make it; or

3. that, where the statement purports to be made by an official person, or to be contained in what purports to be a copy of or extract from a public official document, it was a fair and correct representation of such statement, copy or extract; or

4. that, having consented to become directors, they withdrew their consent before the issue of the prospectus or notice, and that the same was issued without their knowledge or consent; or

5. that the prospectus or notice was issued without their knowledge or consent, and that on becoming aware of its issue they forthwith gave reasonable public notice of such fact; or

6. that after the issue of such prospectus or notice and before allotment thereunder they, on becoming aware of any untrue statement therein, withdrew their consent thereto and caused reasonable public notice of such withdrawal, and of the reason therefor, to be given.[3]

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[1] See *Weir* v. *Bell, suprà*.

[2] The Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 84.

[3] See last note, and *Macleay* v. *Tait*, [1906] A. C. 24.

The term "promoter" as used in connection with a company has no very definite meaning; it involves "the idea of exertion for the purpose of getting up and starting the company (or what is called 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it."[1] Thus the vendor of property, for which the public are asked to subscribe, may or may not be a promoter. But the term "promoter" within the Act does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company.[2]

In addition to his remedy against the directors or other persons, who have induced him to take shares by fraudulent mis-statements contained in the prospectus of a new company a shareholder may be entitled also to bring an action to compel the company, if it is not in liquidation, to take back the shares and repay him the money, which he paid for them, as money obtained by the company through the fraud of its agents.

"Where a company has obtained a benefit through the fraud of an agent, the person defrauded may recover back his money from the company" on proof that "he paid his money in consideration of certain statements and acts of the secretary, directors and managers of the company; that the circumstances under which they got the money were fraudulent; that the transaction was not *bonâ fide* but a fraudulent transaction to get his money without any consideration; and that the money found its way into the coffers of the company."[3] The company has derived a material benefit from the fraud of its agent. In such a case the principle is that he, who profits by the fraud of his agent, adopts the fraudulent act and becomes responsible to the party for any damage which he has sustained in consequence of the fraud;[4] and this is so although the specific fraud was committed without any authority from him at the time.

It will be a great advantage to the shareholder if he can succeed in obtaining this relief, as his name will then be struck off the register of shareholders, and he will not be liable to the creditors of the company—at all events not after a year has elapsed. A company differs in this respect from an ordinary partnership.

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[1] *Per cur.* in *Emma Silver Mining Co.* v. *Lewis* (1879), 4 C. P. D. at p. 407.

[2] S. 84 (5). "Expert" includes any person whose profession gives authority to a statement made by him. The Act also provides for indemnifying any person whose name has been improperly inserted as a director (s. 84 (3)), and for contribution from co-directors (s. 84 (4)).

[3] *Per* Grove, J., in *Blake* v. *Albion Life Assurance Co.* (1878), 4 C. P. D. at pp. 99, 100. See also *Swire* v. *Francis* (1877), 3 App. Cas. 106.

[4] See *per* Cockburn, C. J., in *Weir* v. *Bell* (1878), 3 Ex. D. at p. 249.

It is impossible, as a general rule, for a partner at any time to retire from or repudiate the partnership without first satisfying, or remaining bound to satisfy, the liabilities of the partnership. He may have been induced by the fraud of his co-partners to enter into the partnership, and that may be a ground of relief against them, but it is no ground for getting rid of a liability to creditors. This is the case whether the partnership is a going concern or whether it has stopped payment or become insolvent. In the case of a joint-stock company, however, the shares are in their nature and creation transferable, and transferable without the consent of creditors, and a shareholder, so long as the company is a going concern, can by transferring his shares get rid of his liability to creditors either immediately or after a certain interval. The assumption is that, while the company is a going concern, no creditor has any specific right to retain the individual liability of any particular shareholder. A shareholder therefore, so long as no proceedings have been commenced for winding up the company, may throw back upon the company shares which he has been induced to take by fraud without reference to any claims of creditors. If, however, the company has become insolvent and has stopped payment, serious injury might be inflicted on its creditors, could shares be then repudiated on such grounds; hence a shareholder, though grievously wronged, cannot at this stage rescind his original contract and retire from the concern.[1]

On a sale of property the fraud is not as a rule practised directly by the vendor on the purchaser; it often happens that an agent for the purchaser has received a gratuity from the vendor.[2] Again, a vendor may be guilty of unfair concealment of facts which ought to be disclosed to a person seeking to purchase; such unfair concealment would amount to fraud,[3] though there are cases in which, in the absence of active fraud, silence as to some fact which it would be material to the one party to know, but which the other is not legally bound to communicate, may involve the purchaser in loss, for which the law affords him no remedy.

When the vendor of land or minerals, with a view to the formation of a company, adopts the character of promoter, "a fiduciary, or at all events a quasi-fiduciary, relation arises between him and the company. He is bound to protect its interests and those of the shareholders. All his dealings with them and for them should be *uberrimæ fidei.* He should conceal nothing from them which it is essential to them to know."[1] And accordingly a negotiation, carried on between the agent for the purchaser and the vendor as principal in which the agent for the purchaser receives any benefit or advantage from the intending vendor, is *primâ facie* impeachable as a fraud upon the purchaser.[2]

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[1] *Tennent* v. *City of Glasgow Bank* (1879), 4 App. Cas. 615; *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317.

[2] See *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549; *Grant* v. *Gold Exploration, &c., Ltd.*, [1900] 1 Q. B. 233.

[3] See the substance of Lord Hatherley's remarks in *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. at pp. 1243, 1244.

Where in the course of the winding up of a company under the Companies Acts it appears that any person, who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator or other officer of the company, has misapplied or retained or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may on the application of the official receiver, or of the liquidator of the company, or of any creditor or contributory of the company, examine into the conduct of such person and compel him to make repayment or restoration, together with interest at such rate as the Court thinks just, or to contribute by way of compensation to the assets of the company such sum as the Court thinks just.[3]

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[1] *Per* Cockburn, C. J., in *Twycross* v. *Grant* (1877), 2 C. P. D. at p. 538.

[2] *Whaley Bridge Printing Co.* v. *Green* (1879), 5 Q. B. D. 109.

[3] 8 Edw. VII. c. 69, s. 215 (1), re-enacting the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 10 (1). See *In re London and General Bank*, [1895] 2 Ch. 673 ; *In re Kingston Cotton Mill Co.*, [1896] 1 Ch. 6 ; *In re Kingston Cotton Mill Co.* (No. 2), [1896] 2 Ch. 279.

CHAPTER XII.

ACTIONS FOR LOSS OF SERVICE, &c.

THE common law allowed an action on the case to be brought by a master or other person entitled to the services of another against any one, who without just cause induced that other to quit the master's employment or by wrongful assault or imprisonment prevented him from performing such services. This rule was not restricted to cases in which the parties were strictly master and servant, or in which the services were due under any contract; it applied wherever the right to such services was one recognised by law or arose naturally out of the relationship between the parties.[1] Thus, a parent has a right of action for personal injury to his child or a master for the battery of his servant, if he is thereby deprived of the help and comfort to which he is entitled.

"If a servant is beat, the master shall not have an action for this battery unless the battery is so great that by reason thereof he loses the service of his servant; but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant," but by reason only of its consequences, viz., the loss of service; "for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action."[2] Nor can the master sue in respect of a bodily hurt done to the servant causing his immediate death.[3]

Hence whenever the relation of master and servant exists, an action will lie against any one who, knowing of that relation and without just cause or occasion, induces the servant to break his contract and leave the plaintiff's employment to the injury of the plaintiff; or menaces and threatens the plaintiff's workmen, so that they leave their work, and the plaintiff is thereby prevented from selling his goods.[1] Such menaces may be open or disguised; they need not be threats of personal violence -threats of serious annoyance and damage will be sufficient —and they may be addressed either to the servant himself or to his wife or even to his children; "and in considering whether coercion has been applied or not, numbers cannot be disregarded."[2] So, too, an action will lie against any one, who knowingly and without just cause or occasion harbours the servant and takes him into his own employ during the agreed term of service, whereby the master is injured.[3] The rule is not restricted to menial or domestic servants; it applies to any one who has contracted for personal service for a definite period and who during such period has been wrongfully incited and procured to abandon such service to the loss of the person whom he has contracted to serve. For this injury an action is maintainable against the wrong-doer, though the master may also have an action against the servant for breach of contract.

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[1] See *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193.

[2] *Per cur.* in *Robert Marys's Case* (1612), 9 Rep. at p. 113 a.

[3] *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88; followed in *Clark* v. *London General Omnibus Co., Ltd.*, [1896] 2 K. B. 648.

A servant, on the other hand, may have an action for loss of employment against any one, who without just cause or occasion induces his master to dismiss him from his service. This is not so unless the discharge by the master constitutes a breach of the contract of employment. The servant must show that damage has ensued to himself by reason of the master's breach of contract, and that such breach of contract was the direct result of the defendant's interference. There is authority for holding that an action will also lie for maliciously inducing a person to abstain from entering into a contract to employ the plaintiff, if loss thereby ensues to him; but the law on this point is far from clear.[4] It is not actionable for A. merely to induce B. not to enter into a contract with C. But in cases outside the Trade Disputes

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[1] *Garret* v. *Taylor* (1621), Cro. Jac. 567; and see *Springhead Spinning Co.* v. *Riley* (1868), L. R. 6 Eq. 551.

[2] *Per* Lord Lindley in *Quinn* v. *Leathem,* [1901] A. C. at p. 540.

[3] *Lumley* v. *Gye* (1853), 2 E. & B. 216; *Evans* v. *Walton* (1867), L. R. 2 C. P. 615; *Bowen* v. *Hall* (1881), 6 Q. B. D. 333; *Fred. Wilkins & Bros., Ltd.* v. *Weaver*, [1915] 2 Ch. 322. As to the measure of damages in an action for enticing away the servant of another, see *Gunter* v. *Astor* (1819), 4 Moore, 12.

[4] *Temperton* v. *Russell and others,* [1893] 1 Q. B. 715; but see *Allen* v. *Flood,* [1898] A. C. 1.

Act, 1906,[1] it is an actionable wrong for A. without lawful justification by threats, intimidation or violence to prevent B. from contracting with C. In such cases it is actionable for A. and others unlawfully to conspire to prevent B. from contracting with C.[2]

By virtue of the Trade Disputes Act, 1906,[1] the law has now been altered in the case of any act done "in contemplation or furtherance of a trade dispute." A trade dispute is defined in the Act as "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person."[3] The Act declares that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills;"[4] and further that "an act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."[5]

Another illustration of the same principle is the action of seduction, which is brought not for the wrongful or immoral act of the defendant, but for the loss of the services of the person seduced. It is—in theory, at all events—an action brought by a master against a person who has wrongfully deprived him of the services of his servant, and so occasioned him loss or inconvenience. As a matter of fact, however, the action is generally brought by a parent for the loss of the services of his daughter. These may be of but little pecuniary value to the parent, but the jury is allowed to take into their consideration all the circumstances of the case and to award the parent damages for the immoral conduct of the defendant, although this is strictly no part of the cause of action. The action lies whenever the defendant has deprived the plaintiff of the help and assistance which he was entitled to receive from the person seduced. The relationship of master and servant must, however, exist between the plaintiff and the girl seduced at the time both of the seduction and of the subsequent confinement; without the former there is no *injuria*, without the latter no *damnum*.[1] The girl herself has no right of action, as she was a consenting party.

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[1] 6 Edw. VII. c. 47.

[2] *Quinn* v. *Leathem*, [1901] A. C. 495; *South Wales Miners Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; *Giblan* v. *National Amalgamated Labourers' Union*, [1903] 2 K. B. 600.

[3] 6 Edw. VII. c. 47, s. 5; and see 9 & 10 Geo. V. c. 69, s. 8.

[4] S. 3.

[5] S. 1.

It is essential, however, that the father should show that his daughter was in the habit of rendering him some personal assistance or took some part in the daily work of the household, and that she was prevented by her confinement from continuing to perform such services, or that she deserted her home at the instigation of the defendant. If the daughter was not residing at home but was in the employ of a third person at the time of such confinement or desertion, only that third person can sue; for the loss of service falls only on him. It cannot be denied that this state of the law occasionally works great hardship, as such third person generally refuses to sue. And where the girl was at the time of her confinement in the service of the seducer himself, no action can be maintained. On the other hand, our Courts accept slight evidence of loss of service as sufficient to support the action;[2] and when once that foundation is laid, they allow all the circumstances of the case to be taken into consideration in calculating the amount of the damages.[3] This amount is not in any way regulated by the smallness of the service which the parent has lost.

A similar action formerly lay at common law at the suit of a husband for the abduction of his wife, *per quod consortium amisit*; but its place is now usually taken by an application for a writ of *habeas corpus*, or by a claim for damages against a co-respondent in the Divorce Court.

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[1] *Davies* v. *Williams* (1847), 10 Q. B. 725; *Peters* v. *Jones*, [1914] 2 K. B. 781.

[2] *Whitbourne* v. *Williams*, [1901] 2 K. B. 722; *Dent* v. *Maguire*, [1917] 2 I. R. 59.

[3] See *Hall* v. *Hollander* (1825), 4 B. & C. at p. 663, and *post*, p. 1282 *et seq.*

CHAPTER XIII.

DISTURBANCE OF EASEMENTS AND OTHER RIGHTS OVER LAND AND WATER.

THERE are many cases in which one man has rights over the land of another, or a right to the flow of water or to the access of light to his own land from across the land of another. For any disturbance or obstruction of these rights an action lay at common law. Such a disturbance or obstruction is really a private nuisance, and might, therefore, have been dealt with in Chapter VIII. But as these rights present many special features of their own, we have thought it best to discuss their characteristics in a separate chapter.

There are five different classes of these rights:—

I. Easements.
II. *Profits à Prendre.*
III. Personal Licences.
IV. Customary Rights.
V. Natural Rights.

We have already defined the first four classes of these rights and stated the main distinctions between them.[1] But a brief recapitulation may not be out of place.

I. EASEMENTS.

An easement is a right which the owner of one piece of land has over an adjoining piece of land—such as a right to walk over it, to pour water on to it, or to carry a pipe through it for the conveyance of gas or water. The right is not vested in the owner of the first piece of land personally, but only in him as the owner of that land and so long as he owns it.[1] If he sells that piece of land, the right will pass along with it to the purchaser and may no longer be exercised by the former owner. It is "appurtenant" to the land and "runs with it;" it is in technical language an "incorporeal hereditament." The land to which the right is thus attached is called the dominant tenement; the land over which the easement is exercised is called the servient tenement. Should these two tenements subsequently become the property of the same owner, the easement disappears.

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[1] See *ante*, pp. 24—27, 76—86.

In order to succeed in an action for the disturbance or obstruction of an easement, it is necessary for the plaintiff to establish three things:—

(i.) that he is the owner of the dominant tenement;

(ii.) that he or his predecessors in title as owners of the dominant tenement acquired the right in question

- (a) by express grant;
- (b) by a grant implied from or written into an express grant of the land itself;
- (c) by prescription at common law;
- (d) by presumption of a grant made since 1189 and subsequently lost; or
- (e) by prescription under the Prescription Act, 1832;

(iii.) that the defendant has disturbed or obstructed the plaintiff in the exercise of his right.

It is not necessary that the plaintiff should have suffered any pecuniary loss, although such evidence may, of course, be given to increase the amount of the verdict. Actual damage need not be shown if the defendant is proved to have violated the right of the plaintiff.

(i.) The ownership and occupation will be proved by the plaintiff as in an action of trespass. It is necessary to clearly define the tenement to which the easement is attached. "There can be no such thing according to our law, or according to the civil law, as what I may term an easement in gross. An easement must be connected with a dominant tenement."[1]

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[1] See the remarks of Willes, J., in *Bailey* v. *Stevens* (1862), 12 C. B. N. S. at pp. 110-112, and *Derry* v. *Sanders*, [1919] 1 K. B. 223.

(ii.) Easements may be acquired by grant, express or implied, or by prescription.

(a) Cases of express agreement are comparatively rare and present little difficulty, as the rights of the parties are regulated by the instrument which creates the easement. Strictly such an instrument should be under seal, for at common law an incorporeal hereditament could only be created by a deed. In the present day, however, an objection that there is no seal will not be allowed to prevail, where it is in the opinion of the Court inequitable to insist upon it—as where it has been agreed that money should be paid for the right, or where the owner of the servient tenement has either by acquiescence or express consent induced the owner of the dominant tenement to incur expense in the erection of permanent works.[2] Moreover, an agreement to grant an easement will be enforced, if it be in writing so as to satsify section 4 of the Statute of Frauds; so will even a verbal agreement to grant an easement which has been partly performed.[3]

(b) Easements may also arise by implied grant, *e.g.*, where the owner of property severs it into two or more portions, either retaining one in his own possession or disposing of both to different purchasers. In such a case the benefit of all "continuous and apparent" easements will pass to the purchaser without an express grant, on the principle that "no man shall derogate from his own grant." But a corresponding reservation of easements will not be implied against the purchaser in favour of a tenement retained by the vendor except in cases of absolute necessity.[4] Thus upon a general conveyance of land there is no implied grant by the purchaser of an easement of light necessary for the enjoyment of an adjacent house retained by the vendor.[5]

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[1] *Per* Lord Cairns, L. J., in *Rangeley* v. *Midland Ry. Co.* (1868), L. R. 3 Ch. at p. 311.

[2] *The Duke of Devonshire* v. *Eglin* (1851), 14 Beav. 530; and see *Plimmer* v. *Mayor of Wellington* (1884), 9 App. Cas. 699.

[3] *McManus* v. *Cooke* (1887), 35 Ch. D. 695.

[4] *Davies* v. *Sear* (1869), L. R. 7 Eq. 427.

[5] *Ellis* v. *Manchester Carriage Co.* (1876), 2 C. P. D. 13.

In the case of *Wheeldon* v. *Burrows*,[1] Thesiger, L. J., laid down two general propositions :—

"On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."

"If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." [2]

This last proposition is, however, subject to certain exceptions, the best known of which is the rule as to "ways of necessity."

The most common form of easements of necessity is that of the right of way across the land of another. "Where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself." [3]

Again, when the two tenements are granted to different purchasers at the same time, they will pass with the reciprocal burden and benefit of their continuous and apparent easements, so that the purchaser of one will not be entitled to block the lights of the other as against his fellow-purchaser, though he might have done so as against the vendor. "The sales to the plaintiff and defendant being sales by the same vendor and taking place at one and the same time, the rights of the parties are brought within the application of the general rule of law" that a grantor shall not derogate from his own grant.[4]

(c) When the easement claimed has not been acquired by grant express or implied, the claim must be founded upon prescription, that is to say, upon an enjoyment of the benefit "during time whereof the memory of man runneth not to the contrary." Our lawyers in the days of the Plantagenets fixed this time as commencing in 1189, the first year of the reign of King Richard I., a date to which succeeding generations have slavishly and absurdly adhered. But it was long ago decided that it was not necessary for the plaintiff to produce affirmative evidence that his predecessors in title had enjoyed the right ever since 1189. Proof of user as of right for so long as aged persons could remember was accepted as sufficient to raise a presumption that it had existed from time immemorial. Such user must have been neither secret, nor forcible, nor by the permission of the owner of the servient tenement (*nec clam, nec vi, nec precario*); else it would not be "user as of right." Subsequently, "for the furtherance of justice and the sake of peace," proof of such a user for twenty years was held sufficient to raise a presumption that the right had been enjoyed from time immemorial.[1]

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[1] (1879), 12 Ch. D. at p. 49 ; and see *Mundy* v. *Duke of Rutland* (1883), 23 Ch. D. 81, 97 ; *Russell* v. *Watts* (1885), 10 App. Cas. 590.

[2] See *Midland Ry. Co.* v. *Miles* (1886), 33 Ch. D. 632, 644 ; *Brown* v. *Alabaster* (1887), 37 Ch. D. 490 ; *Schwann* v. *Cotton*, [1916] 2 Ch. 459.

[3] 1 Wms. Saund. 323, n. ; *Pinnington* v. *Galland* (1853), 9 Exch. 1, 12 ; *Goodhart* v. *Hyett* (1883), 25 Ch. D. 182.

[4] *Per* Tindal, C. J., in *Swansborough* v. *Coventry* (1832), 9 Bing. at p. 309 ; cited with approval by Jessel, M. R., in *Allen* v. *Taylor* (1880), 16 Ch. D. at p. 358.

But this presumption could always at common law be rebutted by proof that the enjoyment had in fact commenced within the period of legal memory. If the defendant could prove the actual date of the commencement of the enjoyment and that date was subsequent to 1189, the plaintiff's claim was defeated.

(d) To avoid this hardship a new method of claim was introduced, by which the right was based upon a fictitious grant, supposed to have been made about the time when the enjoyment of the right commenced and to have been subsequently lost. Such a grant, although made since 1189, would afford a legal origin for the user, provided the right claimed was one which could be created by grant. In all such cases, where the user had continued without interruption for twenty years or more before action brought, the long enjoyment was accepted as strong presumptive (but not conclusive) evidence of the existence of such a "lost grant." It is a principle of our law that a legal origin is, if possible, to be presumed for a long-established practice.[2] Lord Ellenborough once said that he would, if necessary, presume a hundred lost grants whenever people have for a long period of time been doing something which they would have had no right to do, unless they had had a deed of grant. But "the presumption of a lost grant from long-continued enjoyment . . . only arises where the person against whom the grant is claimed might have prevented or interrupted the exercise of the subject of the supposed grant."[1] "You cannot acquire any rights against others by a user which they cannot interrupt."[2] Nor can a lost grant be presumed where the right claimed is one not known to the law, or where the class of persons claiming it cannot in law possess such a right.[3]

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[1] *Per* Parke, B., in *Bright* v. *Walker* (1834), 1 Cr. M. & R. at p. 217, cited with approval by Pollock, B., in *Bass* v. *Gregory* (1890), 25 Q. B. D. at p. 484.

[2] *Johnson* v. *Barnes* (1873), L. R. 8 C. P. 527; see also the remarks of Lord Herschell in *Philipps* v. *Halliday,* [1891] A. C. at p. 231; and *Hulbert* v. *Dale,* [1909] 2 Ch. 570.

> "We must bear in mind the cardinal rules of prescription, first, that no length of enjoyment can establish a title which could have no legal origin, as, for instance, of an estate or interest which the law does not recognise;[4] and next, that 'antiquity of time justifies all titles and supposeth the best beginning the law can give them.' So that, if evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory."[5]

(e) A better method, however, of dealing with the difficulty was provided in 1832 by the passing of the Prescription Act.[6] This statute did not abolish any of the methods which previously existed of claiming such rights.[7] But it provided that after user as of right and without interruption, in the case of a *profit à prendre* for thirty years and in the case of an easement for twenty years, the *primâ facie* right should not be defeated by proof that it commenced at some prior date subsequent to the first year of Richard I.[8]

By the same sections, if the right be enjoyed in the case of a *profit à prendre* for sixty years and in the case of an easement for forty years, the right becomes absolute and indefeasible, unless it can be shown that such user took place with the permission of the owner of the servient tenement expressly given by deed or writing. In other words, it will no longer defeat the right, if it appears to have been enjoyed by the parol licence of the person whose land is affected by it.[1]

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[1] *Per* Lopes, L. J., in *Chastey* v. *Ackland*, [1895] 2 Ch. at p. 397.

[2] *Per* Bowen, L. J., in *Harris* v. *De Pinna* (1886), 33 Ch. D. at p. 262.

[3] *Lord Chesterfield* v. *Harris*, [1911] A. C. 623; *Staffordshire, &c., Canal Navigation* v. *Bradley*, [1912] 1 Ch. 91.

[4] *Bailey* v. *Stevens* (1862), 12 C. B. N. S. 91; *Att.-Gen.* v. *Mathias* (1858), 4 K. & J. 579.

[5] *Per cur.*, in *Johnson* v. *Barnes* (1872), L. R. 7 C. P. at p. 604; decision affirmed (1873), L. R. 8 C. P. 527.

[6] 2 & 3 Will. IV. c. 71.

[7] *Warrick* v. *Queen's College, Oxford* (1871), L. R. 6 Ch. 716, 728; *Aynsley* v. *Glover* (1875), L. R. 10 Ch. 283.

[8] Ss. 1, 2.

There are certain difficulties in proceeding under the Act which did not exist at common law.

1. The period of the duration of the enjoyment relied on must immediately precede the commencement of the action in which the right is contested.
2. Although the acts of user need not necessarily continue down to the very moment of action brought, yet some act of the kind must be proved to have taken place in the first and last, and probably in every, year of the period of prescription.
3. There must be nothing in the facts inconsistent with the user having been as of right against all persons.
4. A right of claim by user can only be co-extensive with the user.

The right to light stands on a somewhat different footing. "An owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, shop or other place of business."[2] Section 3 of the Prescription Act provides that, when such a right shall have been actually enjoyed for the full period of twenty years without interruption, it shall be deemed absolute and indefeasible, unless it shall appear that it was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.[3]

"The right to what is called an 'ancient' light now depends upon positive enactment. It does not require any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. . . . After an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible. It cannot, therefore, be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment; nor will it be affected or prejudiced by any attempt to extend the access of light beyond that which was enjoyed uninterruptedly during the required period."[1]

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[1] These sections do not apply to rights of light, which are governed by s. 3: *Perry* v. *Eames*, [1891] 1 Ch. 658; nor do they bind the Crown: *Wheaton* v. *Maple*, [1893] 3 Ch. 48.

[2] *Per* Lord Lindley in *Colls* v. *The Home and Colonial Stores*, [1904] A. C. at p. 208; and see the judgment of Lord Davey, *ib.*, at p. 204, and *Jolly* v. *Kine*, [1907] A. C. 1; *Davis* v. *Marrable*, [1913] 2 Ch. 421.

[3] *Scott* v. *Pape* (1886), 31 Ch. D. 554; *Harris* v. *De Pinna* (1886), 33 Ch. D. 238.

Thus, where the owner of a dwelling-house containing a window, which under the statute had acquired an absolute and indefeasible right to light, opened two other windows one on each side of the old window, the indefeasible right did not thereby become defeasible; for by opening the new windows the owner of the dwelling-house does no wrong in the eye of the law to his neighbour, who is at liberty to build up on his own land so as to block the new windows, though he must not obstruct the ancient one. In the case of windows "with moveable shutters, which are opened at the owner's pleasure for admission of light, the right is gained at the end of twenty years, if he opens them at any time he pleases during those twenty years, and there is no such interruption of access over the neighbouring land as is contemplated by section 4."[2] There can be no prescriptive right to light passing through an ordinary doorway.[3]

An enlargement of an ancient window, which substantially includes within its area the ancient light, will not cause the loss of the easement, nor will its diminution be evidence of an abandonment as regards the remaining part.[4] Neither will the easement be lost by an alteration in the plane of the dominant tenement, either by advancing or setting it back, provided that the light reaching the new windows be substantially the old cone of light which entered the windows in their former position; and generally the pulling down of a house will not cause the loss of any easements already attaching to it, if it is intended to rebuild it within a reasonable time.[5] But if a building has been pulled down and a new one built in its place, and it cannot be shown that the windows of the new building are in any way identified with the old windows, the easement will be lost.[6]

(iii.) Lastly, the plaintiff must prove that the defendant has obstructed or prevented the plaintiff's enjoyment of his right. A question often arises as to what amounts to an obstruction. The erection of an iron fence across a right of way would certainly amount to an obstruction. But the erection of a stile with convenient steps across a footpath is no obstruction; indeed, it is rather an admission of the right. No action will lie against the owner of the servient tenement for merely omitting to repair the way; he is not, as a rule, bound to do anything. It is the duty of the grantee of the right to repair a way or to clean out a watercourse, and he has a right to go upon the servient tenement for such a purpose.

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[1] *Per* Lord Westbury, L. C., in *Tapling* v. *Jones* (1865), 11 H. L. Cas. at pp. 304, 305.

[2] *Per* Kay, J., in *Cooper* v. *Straker* (1888), 40 Ch. D. at p. 28.

[3] *Levet* v. *Gas Light & Coke Co.*, [1919] 1 Ch. 24.

[4] *Newson* v. *Pender* (1884), 27 Ch. D. 43.

[5] *Luttrel's Case* (1601), 4 Rep. 86; *Bullers* v. *Dickinson* (1885), 29 Ch. D. 155.

[6] *Fowlers* v. *Walker* (1880), 49 L. J. Ch. 598; (1881), 51 L. J. Ch. 443; but see *Ecclesiastical Commissioners* v. *Kino* (1880), 14 Ch. D. 213.

In order to succeed in an action for the obstruction of ancient lights, it is not enough for the plaintiff to prove that owing to the obstruction he enjoys less light; he must show that the obstruction amounts to a nuisance to him, having regard to his previously existing easement of light.[1] In other words, he must prove that it is of such a character as to render his tenement materially less fit for the purposes of business, if it be a place of business.

> "Any substantial interference with an owner's comfortable use and enjoyment of his house according to the usages of ordinary persons in the locality is actionable as a nuisance at common law. . . . It is still, as it has always been, a question of nuisance or no nuisance, but the test of nuisance is not—How much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had? but—How much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?"[2]

Defences.

There are many matters which a defendant may urge in answer to a *prima facie* case which the plaintiff has established. For instance, it is open to him to show if he can that the user relied on by the plaintiff was forcible, or secret, or by permission. The Prescription Act makes no change in the old rule that the enjoyment relied upon must have been *nec vi, nec clam, nec precario.* Hence the action will still be defeated by any evidence which prior to the statute would have been an answer to the claim—as, for instance, by proof that the user could not have been as of right, or that the owner of the servient tenement was during any portion of the period of prescription incapable of making a grant of a right such as the plaintiff claims, *e.g.*, that he was a lunatic, an infant or tenant for life.[3]

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[1] *Colls* v. *The Home and Colonial Stores*, [1904] A. C. 179.
[2] *Per* Farwell, J., in *Higgins* v. *Betts*, [1905] 2 Ch. at p. 215.
[3] Prescription Act, 1832 (2 & 3 Will. IV. c. 71), ss. 7, 8.

So a tenant for a term of years cannot acquire by user an easement, such as a right of way over land occupied by another tenant under the same landlord, even if that user has existed for the period of forty years mentioned in section 2 of the Prescription Act.[1]

Again, it is open to the defendant to prove the existence of an obstruction at the commencement of the period of twenty years or an interruption of the enjoyment (as defined by the statute) at some time during that period.[2] Section 4 of the Act provides that "each of the respective periods of years shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought in question;" and "no act or other matter shall be deemed an interruption within the meaning of this statute unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made." It would seem that the person, who asserts that an alleged twenty years' enjoyment of light has been interrupted during that period, is bound to prove that some notice (other than that which arises from the mere existence of a physical obstruction) was given to the person claiming the right by the person by whose authority the interruption was made.[3]

Where the plaintiff claims a right of way or a right to any watercourse or use of water, if the servient tenement be held for any term of life or for any term of years exceeding three, the time of enjoyment during the continuance of that term is excluded in computing the period of forty years in case the claim should be resisted within three years next after the end or sooner determination of such term by any person entitled to any reversion expectant on its determination.[4]

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[1] *Kilgour* v. *Gaddes*, [1904] 1 K. B. 457.

[2] *Glover* v. *Chapman* (1874), L. R. 10 C. P. 108; *Mitchell* v. *Cantrill* (1887), 37 Ch. D. 56.

[3] *Seddon* v. *Bank of Bolton* (1882), 19 Ch. D. 462.

[4] S. 8; and see *Palk* v. *Skinner* (1852), 18 Q. B. 568, which shows that s. 9 only applies to the period of forty years. A remainderman is not such a person: *Symons* v. *Leaker* (1885), 15 Q. B. D. 629.

Proof of such facts may, therefore, sometimes afford a defence to the action.

Again, the right claimed by the plaintiff must not be in excess of the right granted to him, or of the enjoyment upon which he relies as raising a prescription in his favour. The burden on the servient tenement must not be enlarged. The right claimed must not be more extensive than the right granted or the user proved.

Thus proof of a right of way to a shed will not imply a right of way to a house built afterwards on the same site.[1] A right of way to carry coals would not necessarily include a right to carry other burdens, and *vice versâ*;[2] and a right to drive pigs has been held not to include a right to drive horned cattle.[3]

So where the pollution of a stream has gradually but imperceptibly increased for more than twenty years the right to pollute will be limited to the extent of pollution which existed twenty years before action brought.[4]

Lastly, an easement may be abandoned;[5] but mere non-user does not amount to abandonment. It is always a question of fact under all the circumstances of the case whether the act amounts to an abandonment, or was intended as such.[6] An alteration of the dominant tenement does not affect the right to an existing easement, provided the burden of the servient tenement is not increased.[7]

II. PROFITS À PRENDRE.

We now proceed to deal with *profits à prendre*—a class of rights over land which, though different in their nature from easements, closely resemble them in the mode of their acquisition and in the remedies for their disturbance or obstruction. A *profit à prendre* is a right, which a man may have, to enter on the land of another and take something off or out of it and carry it away for his own benefit. This liberty to take a profit out of the land is the main distinction between a *profit à prendre* and an easement. In the case of an easement those who exercise the right may never take anything out of, or carry anything away from, the land on which they enter, except running water, which is no man's property.[1] But persons who enjoy various rights of *profits à prendre* may, in some cases, catch fish, cut turves or faggots, or dig up gravel, and carry away what they thus obtain ; in other cases they may send in animals to graze upon the servient tenement.

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[1] *Bayley* v. *G. W. Ry. Co.* (1884), 26 Ch. D. 434.

[2] *Iveson* v. *Moore* (1699), 1 Salk. 15; *Reynolds* v. *Edwards* (1741), Willes, 282.

[3] *Ballard* v. *Dyson* (1808), 1 Taunt. 279; *Serff* v. *Acton Local Board* (1886), 31 Ch. D. 679.

[4] *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. 478; *McIntyre Brothers* v. *McGavin*, [1893] A. C. 268.

[5] *Dynevor* v. *Tennant* (1888), 13 App. Cas. 279.

[6] *Cook* v. *Mayor of Bath* (1868), L. R. 6 Eq. 177.

[7] *Harvey* v. *Walters* (1873), L. R. 8 C. P. 162; *G. W. Ry. Co.* v. *Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; *Royal Mail Steam Packet Co.* v. *George & Branday*, [1900] A. C. 480.

A right of *profit à prendre* is in most cases vested (as an easement always is) in the owner of some dominant tenement. It is then a hereditament of a purely incorporeal nature. And, as a rule, a connection is strictly maintained between the dominant tenement and the extent of the right enjoyed.

When a right of *profit à prendre* in the land of another is attached to a dominant tenement, it cannot be without stint and for commercial purposes.[2]

In an action of trespass for cutting down and carrying away trees growing in the plaintiff's close, the defendant in justification of his acts set up a claim to an immemorial right in A., the owner in fee of an adjoining close, and his tenants (of whom the defendant was one), to enter the close of the plaintiff and to cut down and convert to their own use all the trees and wood growing there. This right was claimed as appurtenant to the close of A., but the plea did not allege that the timber so taken was to be used in any way in or about that close. It was held that such a claim was too large to be recognised by law.[3]

A similar rule prevails in the case of those customs of a manor which create a privilege in the nature of a *profit à prendre*. A copyholder may only place upon the common as many cattle as he can house on his copyhold tenement during the winter ; he may only cut as much wood as he needs for the repair of his house or his fences or for fuel to burn in his house ; he may only dig out of the waste as much stone or gravel as he requires for use upon his tenement.[4] He may not, as a rule, sell to others the faggots, timber, stone, &c., which he has a right to take for his own use.

The plaintiff in an action for the obstruction or infringement of a *profit à prendre* which is appurtenant or appendant to land must prove, in the first place, that he is the owner or occupier of the land to which that right is attached. Next, he must establish the existence of the right; and lastly, the obstruction or disturbance of it by the defendant. Like an easement, a *profit à prendre* must be acquired either by grant, express or implied, or by prescription either at common law, by a lost grant or under the statute. The prescription should be laid in the plaintiff "and those whose estate he hath." This is called "prescribing in the *que* estate."[1] The periods fixed by the statute are, however, thirty and sixty years respectively in the case of a *profit à prendre*, instead of twenty and forty years as in the case of an easement.

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[1] *Race* v. *Ward* (1855), 24 L. J. Q. B. 153.

[2] *Lord Chesterfield* v. *Harris*, [1911] A. C. 623.

[3] *Bailey* v. *Stevens* (1862), 12 C. B. N. S. 91.

[4] *Heath* v. *Deane*, [1905] 2 Ch. 86.

But a right of *profit à prendre* is not always attached to a dominant tenement. Such a right is sometimes expressly granted to or acquired by a person or corporation who owns no land in the neighbourhood; it is then called a *profit à prendre* "in gross." It has been decided that section 2 of the Prescription Act does not apply to a right of this kind.[2] Hence a right of *profit à prendre* in gross can only be acquired by grant, express or implied,[3] by prescription at common law or by the presumption of a lost grant. The prescription must be laid either in the plaintiff and his ancestors or in a corporation of which the plaintiff is a member.[4] It follows that a *profit à prendre* in gross cannot be claimed by or on behalf of undefined persons or a fluctuating class, such as the inhabitants of a parish or village. Such a class cannot take a right of *profit à prendre* by grant, hence they cannot acquire such a right by any prescription known to the common law. "No prescription can have had a legal origin where no grant could have been made to support it."[5] Moreover the exercise of such a right by so large a number of persons would speedily destroy its subject-matter. For the same reasons "the public as such cannot prescribe" for any such right.[6] But a corporation can do so, for it is but one person in law.

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[1] *Per* Fry, J., in *Austin* v. *Amhurst* (1877), 7 Ch. D. at p. 692.

[2] *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S. 687; but see the argument of counsel in *Mercer* v. *Denne*, [1905] 2 Ch. at pp. 568—576, and also p. 586.

[3] *Welcome* v. *Upton* (1840), 6 M. & W. 536; *Staffordshire, &c., Canal Navigation* v. *Bradley*, [1912] 1 Ch. 91.

[4] See the remarks of Fry, J., in *Austin* v. *Amhurst, suprà.*

[5] *Per* Tindal, C. J., in *Lockwood* v. *Wood* (1844), 6 Q. B. at p. 64.

[6] *Per* Farwell, J., in *Att.-Gen.* v. *Antrobus,* [1905] 2 Ch. at p. 198.

An exclusive right in gross of common of pasture can be granted to a corporation, and therefore can be acquired by a corporation by prescription on proof either of actual enjoyment from time immemorial by the free burgesses of the corporation, or by receipt of rent or acknowledgment.[1] A right to kill and carry away wild duck on the foreshore of another is a *profit à prendre* and cannot be claimed by custom.[2]

In order to succeed in an action for the disturbance or obstruction of a right of *profit à prendre* in gross, it is necessary for the plaintiff to establish two things only :—

(i.) that such a right is vested in him personally or in a corporation or other defined class of persons of which he is a member; and

(ii.) that the defendant has disturbed or obstructed him in the exercise of his right.

III. Personal Licences.

A licence is merely a permission given by one man to another to do some act, which but for such permission it would be unlawful for him to do. Thus, if A. gives to his friend B. a verbal permission to walk across his land, he does not grant B. an easement but a mere licence, which renders B.'s action in walking across A.'s land lawful and not, as it would otherwise have been, a trespass. A licence is a personal right and cannot be sold or transferred to any one else; it dies with the man to whom it was given. Further, it binds only the man who gave it: it does not bind his land.

A personal licence also differs both from an easement and a *profit à prendre* in this—that it can as a rule be revoked by the licensor at his pleasure, unless the licensee has paid money for it.[3] There are other circumstances in which a licence cannot be revoked. For example, if a licence under seal includes a grant, it is not revocable so as to defeat the grant, *e.g.*, a licence to shoot rabbits and carry away those killed is not revocable, because it is a grant of the rabbits, and if the licence to shoot the rabbits were revoked the grant would be defeated. Moreover, a licence which was in its inception revocable may become irrevocable "owing to some supervening equity," as where the licensor had either by acquiescence or express consent induced the licensee to incur expense in the erection of permanent works.[1]

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[1] *Johnson* v. *Barnes* (1872), L. R. 7 C. P. 592; (1873), L. R. 8 C. P. 527.

[2] *Lord Fitzhardinge* v. *Purcell*, [1908] 2 Ch. 139.

[3] *Cornish* v. *Stubbs* (1870), L. R. 5 C. P. 334; *King* v. *Allen and Sons*, [1916] 2 A. C. 54. It is submitted that the case of *Wood* v. *Leadbitter* (1845), 13 M. & W. 838, is no longer law.

"The distinction between a licence and a grant is clear, and if you find a person affecting to grant by deed rights in respect of real property which are capable of being so granted, that is a grant and not a licence."[2]

Lord Ebury granted by deed to the plaintiffs for a term of years "the exclusive right of fishing" in a defined part of the River Colne, with a proviso that "the right of fishing hereby granted shall only extend to fair rod and line angling and to netting for the sole purpose of procuring fish-baits." The defendant wrongfully discharged into the stream water loaded with sediment, the effect of which was to drive away the fish and injure the breeding. It was held by the Court of Appeal that the grant did not give a mere licence to fish, but a right to fish and to carry away the fish caught; that this was a *profit à prendre* and therefore an incorporeal hereditament; and that the plaintiffs had a right of action against any one who wrongfully did any act by which the enjoyment of their rights under the deed was prejudicially affected.[3]

"'A licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down; but as to carrying away the deer killed and the tree cut down, they are grants.' So here, a licence to enter upon a canal and take the ice is a mere licence, and the right of carrying it away is a grant of the ice so to be carried away."[4]

The rights of a mere licensee must as a rule be enforced by an action of contract, not of tort, for he has no possessory title. He can however claim a declaration that his licence is irrevocable. But questions as to the terms and validity of a licence often arise in an action of trespass, when "leave and licence" is pleaded as a defence. A licence is a leave to do a thing. "An exclusive licence is a leave to do a thing and a contract not to give leave to anybody else to do the same thing;" but unless coupled with a grant, "it confers no interest or property in the thing, and the licensee has no title to sue" in his own name.[1]

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[1] *Plimmer* v. *Mayor of Wellington* (1884), 9 App. Cas. 699, following the principle of *Ramsden* v. *Dyson* (1866), L. R. 1 H. L. 129, 140.

[2] *Per* Rigby, L. J., in *Fitzgerald* v. *Firbank*, [1897] 2 Ch. at p. 103.

[3] *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96.

[4] *Per* Sir W. Page-Wood, V.-C., in *Newby* v. *Harrison* (1861), 1 J. & H. at p. 398, cited with approval by Cotton, L. J., in *Heap* v. *Hartley* (1889), 42 Ch. D. at p. 468.

In *Holford* v. *Bailey*,[2] it was held that the grantee of a several fishery could sue persons who interfered with his right of fishing; but a mere licensee has no right to sue those who interfere with the property over which the licence extends.[3] "To give the plaintiff a sole and exclusive right even for an hour, a deed was necessary; and that would be a grant; and whether the grantee of the fishery had it in fee or for a term of years or even an hour, he could sue for a disturbance during the time that the interest under his grant continued."[4]

IV. CUSTOMARY RIGHTS.

We must next consider a class of rights known as customary rights. Such rights are vested in the persons who enjoy them, because they reside within some definite locality, such as a borough, vill, manor or parish. They are local rather than personal rights. They are privileges in the nature either of easements or of *profits à prendre*. Still they are not strictly speaking easements, for those who enjoy them possess no dominant tenement. Neither are they strictly speaking *profits*, for those who enjoy them do not do so, and cannot claim to do so, by grant. A vague fluctuating body of persons cannot take by grant, nor by prescription; for "all prescription presupposes a grant."[5] They base their claim on the fact that they are inhabitants of some definite locality, and as such "have used time out of mind to have such an advantage or privilege."[6] A custom is in fact a local law; it must hold good within some well-defined and limited area. Within that area it must have been in force continuously, without interruption and acquiesced in by the persons whom it affected. It must be not unreasonable; it must be certain; and the user on which the claim is founded must have been "as of right."[7]

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[1] *Per* Fry, L. J., in *Heap* v. *Hartley* (1889), 42 Ch. D. at p. 470.

[2] (1849), 13 Q. B. 426.

[3] *Newby* v. *Harrison* (1861), 1 J. & H. 393; *Heap* v. *Hartley* (1889), 42 Ch. D. 461.

[4] *Per cur.* in *Holford* v. *Bailey* (1849), 13 Q. B. at p. 446; quoted with approval by Rigby, L. J., in *Fitzgerald* v. *Firbank*, [1897] 2 Ch. at p. 103.

[5] *Per* Lord Lindley in *Hodgson* v. *Gardner's Co.*, [1903] A. C. at p. 239.

[6] *Per cur.* in *Mayor of Lynn Regis* v. *Taylor* (1684), 3 Lev. at p. 160.

[7] See *ante*, pp. 76—86.

"The difference between custom and prescription is only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation; but the rules affecting the subject-matter are in each case the same."[1] Hence there are many rights or privileges in the nature of an easement, which an undefined body or fluctuating class of persons can possess, if they can establish a clear custom in a definite locality. These rights are not easements or *profits à prendre*; they are often mere rights of recreation.

Thus a custom for the inhabitants of a parish to enter on an enclosed field, part of the plaintiff's glebe, and erect a may-pole there and dance round and about it, and otherwise to enjoy thereon any lawful and innocent recreation at any time of the year, was (after a prolonged argument in which all the previous decisions were cited) held good in law.[2] So it was held a good custom for the inhabitants of a township to enter the close of the plaintiff to draw water from a spring thereon.[3] A custom for the freemen and citizens of Carlisle to enter and hold horse-races on the plaintiff's close on Ascension Day in every year was held good.[4]

A custom for the inhabitants of a parish to have a churchway over land within the parish forming the demesne of a manor was also good.[5] The fishermen of Walmer established the right to dry their nets on Walmer beach at all times seasonable for fishing by proof of a local custom.[6] So a custom for the inhabitants of a town to use for recreation a promenade in the town was held good in Ireland.[7]

Again, "a custom for all the inhabitants of a parish to play cricket and all kinds of lawful games, sports and pastimes" is good.[8] And such a right has repeatedly been recognised as valid.[9] A similar custom of recreation, however, claimed for the inhabitants of several parishes was held bad.[1]

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[1] *Per* Farwell, J., in *Mercer* v. *Denne,* [1904] 2 Ch. at p. 556.

[2] *Hall* v. *Nottingham* (1875), 1 Ex. D. 1; and see *Abbot* v. *Weekly* (1665), 1 Lev. 176.

[3] *Weekly* v. *Wildman* (1698), 1 Lord Raym. at pp. 407, 408; *Race* v. *Ward* (1855), 4 E. & B. 702; (1857), 7 E. & B. 382; and see *Dungarvan Guardians* v. *Mansfield,* [1897] 1 I. R. 420.

[4] *Mounsey* v. *Ismay* (1863), 1 H. & C. 729.

[5] *Brocklebank* v. *Thompson,* [1903] 2 Ch. 344.

[6] *Mercer* v. *Denne,* [1905] 2 Ch. 538.

[7] *Abercromby* v. *Fermoy,* [1900] 1 I. R. 302; with which compare *Dyce* v. *Hay* (1852), 1 Macq. 305.

[8] *Fitch* v. *Rawling* (1795), 2 H. Bl. 393; and see *Millechamp* v. *Johnson* (1746), Willes, 205, n.

[9] *Betts* v. *Thompson* (1870), 23 L. T. 427, 430; *Warrick* v. *Queen's College* (1871), L. R. 6 Ch. 716; *Forbes* v. *Ecclesiastical Commissioners* (1872), L. R. 15 Eq. 51. So too in Scotland there are decisions in favour of the national game of golf. Thus in *Magistrates of Earlsferry* v. *Malcolm* (1829), 7 Shaw & Dunlop's Scotch Session Cases, 755, it was held that the inhabitants of the burgh of Earlsferry had a right to play golf over the Ferry Links and the sheriff substitute was directed, "with the assistance of a surveyor, to mark out the best and most convenient spot for the game to be played on." It is clear, too, by the law of Scotland that the inhabitants of a burgh can possess the "right or privilege of walking and making parades" over the soil of an adjoining landowner: *Magistrates of Dundee* v. *Hunter* (1843), 6 Scotch Session Cases, 2nd series. 12.

But when the right claimed by custom is a privilege in the nature of a *profit à prendre*, much greater difficulty arises. It was decided long ago (as early in fact as the reign of Edward IV.) that the inhabitants of a particular locality cannot claim a right of common by prescription or otherwise, as a grant cannot in law be made to such a fluctuating body of persons and their successors.[2] Such a body of persons, moreover, could never release the grant if made; and the whole value of the land would be lost to the grantor, if it were used by so large a number of persons without restriction; the exercise of the right would speedily result in the destruction of its subject-matter.

Nevertheless it is a well-settled principle that a lawful origin must, if reasonably possible, be presumed for any right which has been openly enjoyed for a long period.[3] The Courts will not presume that the rights were created by a lost Act of Parliament,[4] but, short of this, they have gone very far. In some cases the judges have even presumed a grant from the Crown incorporating grantees to such an extent as to enable them to profit by it.[5] In other cases they have discovered a declaration of trust by, or grant upon trust to, a corporation or other person capable of holding the right in question in favour of the inhabitants or other body for whom it is claimed.

Apart from these isolated cases, however, it still remained till 1882 a clear rule of law that a privilege in the nature of a *profit à prendre* cannot be acquired by a shifting body of persons, such as the inhabitants of a borough, parish or township, either by grant, prescription or custom. In that year, however, the House of Lords upheld a right of free inhabitants of the ancient borough of Saltash to fish without limit during Lent for oysters in a fishery in a navigable river belonging to the borough.[1] It is difficult to determine the precise effect of this decision upon the rule laid down in *Gateward's Case.*[2]

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[1] *Edwards* v. *Jenkins*, [1896] 1 Ch. 313.
[2] *Gateward's Case* (1607), 6 Rep. 59 b.
[3] *Haigh* v. *West*, [1893] 2 Q. B. 19.
[4] *Chilton* v. *Corporation of London* (1878), 7 Ch. D. 735.
[5] *Willingale* v. *Maitland* (1866), L. R. 3 Eq. 103.

But this rule does not apply to the freeholders or copyholders of a manor. A manor is a district of lands holden by a lord and by tenants under him, over which lands and tenants he exercises certain rights and jurisdiction. The copyholders of such a manor can by custom acquire against their lord rights of common in the waste of the manor. They are not, indeed, such an indefinite body of persons as are the inhabitants of a village; moreover they all, *ex hypothesi*, occupy tenements within the manor. The freeholders of a manor, too, whatever their number may have become by sub-division of the freeholds, can claim by prescription a *profit à prendre* within the manor;[3] and when the right has been once acquired, they may continue to exercise it, although the manor has become merely a "reputed manor."[4] Instances of such customary rights within a manor have been given in an earlier chapter.[5]

In order to succeed in an action for the disturbance or obstruction of a customary right over the land of another, it is necessary for the plaintiff to establish three things:—

(i.) that a defined class of persons, such as the inhabitants of a particular place or district, have from time immemorial exercised the right claimed over the land in question openly, peaceably, without interruption and without permission from the owner of the land;

(ii.) that the plaintiff is a member of such class; and

(iii.) that the defendant has materially obstructed or disturbed the plaintiff in the exercise of his right.

(i.) The main difficulty in such cases is to establish the right. Legal memory, as we have seen,[6] dates from the first year of Richard I. It was never necessary, however, for the plaintiff to produce affirmative evidence that the custom had extended over so long a period. On proof of the enjoyment of a customary right for a much less period, juries were held justified in finding, if there was no evidence to the contrary, that the custom had existed from time immemorial. A period of twenty years was held sufficient in one case.[1] The usual course is for the plaintiff to call aged witnesses resident in the neighbourhood, who depose to the fact that the custom existed as far back as they can remember.

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[1] *Goodman* v. *Mayor of Saltash* (1882), 7 App. Cas. 633.
[2] (1607), 6 Rep. 59 b.
[3] *Lord Chesterfield* v. *Harris*, [1911] A. C. 623.
[4] *Neal* v. *Duke of Devonshire* (1882), 8 App. Cas. 135.
[5] See Customs of a Manor, *ante*, pp. 82—86.
[6] *Ante*, p. 568.

When an onerous liability has been asserted and submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd, which will support and give a legal origin to such a custom, will be presumed. Therefore a liability to repair a sea-wall submitted to since 1818 was presumed to have a legal origin.[2]

The owners of an oyster fishery had, since the reign of Elizabeth, held courts and granted for a reasonable fee licences to fish to all persons inhabiting certain parishes who had been apprenticed for seven years to a duly licensed fisherman. In an action by a person so qualified against the owners of the fishery for not granting him a licence to fish on payment of the usual fee, it was held that, as every act of fishing had been by licence, there had been no enjoyment as of right so as to give rise to a custom.[3]

An immemorial custom for fishermen, inhabitants of a parish, to spread their nets to dry on the land of a private owner situate near the sea in the parish at all times necessary or proper for the purposes of the trade or business of a fisherman, is a valid legal custom. Such a custom may be established by evidence of user, though the periods of user and the manner and character of the nets dried may have varied from time to time. The use of a modern mode of drying the nets will not deprive the fishermen of the benefit of the custom, provided that an unreasonable burden is not thereby cast upon the landowner. Where the sea has gradually receded, land added by accretion takes the character of, and becomes subject to the same customs as, the land to which it is added.[4]

But the *primâ facie* case, established by the evidence of aged witnesses, will be destroyed if the defendant can show affirmatively that the custom commenced after the year 1189. For no lost grant can be presumed in favour of the inhabitants of a locality; nor will the Prescription Act, 1832,[5] assist the plaintiff. It is true that section 2 of that Act expressly mentions any "claim, which may be lawfully made at the common law by custom, prescription or grant, to any easement." But it has been held that these words do not apply to a claim of the kind we are discussing, because it is not strictly a "claim to an easement."[1] Hence a right claimed under a custom (not being a custom of a manor) in favour of an indefinite body of persons can only be established by prescription at common law, and is therefore liable to be defeated by proof of a commencement within the period of legal memory.

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[1] *R.* v. *Jolliffe* (1823), 2 B. & C. 54.
[2] *L. & N. W. Ry.* v. *Fobbing Levels Commissioners* (1896), 66 L. J. Q. B. 127.
[3] *Mills* v. *Mayor, &c., of Colchester* (1867), L. R. 2 C. P. 476 ; 3 *ib.*, 575.
[4] *Mercer* v. *Denne,* [1904] 2 Ch. 531 ; [1905] 2 Ch. 538.
[5] 2 & 3 Will. IV. c. 71. See *ante*, p 570.

"A defendant may no doubt defeat a custom by showing that it could not have existed in the time of Richard I., but he must demonstrate its impossibility, and the *onus* is on him to do so if the existence of the custom has been proved for a long period; this was done, for instance, in *Simpson* v. *Wells*,[2] where the claim of a custom to set up stalls at the Statute Sessions for the hiring of servants was defeated by showing that such sessions were introduced by the Statutes of Labourers, the first of which was in the reign of Edward III. . . . Not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present unless such inference is irresistible, but it ought to presume everything that is reasonably possible to presume in favour of such a right."[3]

In the case of an ordinary local custom the right must be laid in the inhabitants: in the case of a manorial custom, in the freeholders or copyholders of the manor, or in both—it would be wrong to lay it in the public generally.[4] The plaintiff in an action brought to establish a customary right often fails by proving too much; the witnesses called in support of the right frequently take pleasure in asserting, contrary to the fact, that any one who liked could exercise the right in question, and that persons from other localities frequently did so.

Thus, in *Fitch* v. *Rawling*,[5] though the first plea which claimed a custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of it at all seasonable times of the year at their free will and pleasure" was held good, the second plea claiming a similar right "for all persons for the time being in the said parish" was held bad.

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[1] See *Mounsey* v. *Ismay* (1865), 3 H. & C. 486; and *Mercer* v. *Denne*, [1904] 2 Ch. at pp. 539, 554.

[2] (1872), L. R. 7 Q. B. 214. A different rule prevails in the case of such an immemorial custom at a fair: see the judgment of Blackburn, J., *ib.*, at pp. 216, 217; and *Elwood* v. *Bullock* (1844), 6 Q. B. 383.

[3] *Per* Farwell, J., in *Mercer* v. *Denne*, [1904] 2 Ch. at pp. 555, 556; and see *Welcome* v. *Upton* (1840), 6 M. & W. 536; *Hulbert* v. *Dale*, [1909] 2 Ch. 570.

[4] *Heath* v. *Deane*, [1905] 2 Ch. 86; *Coote* v. *Ford* (1900), 83 L. T. 482.

[5] (1795), 2 H. Bl. 393.

In *Earl of Coventry* v. *Willes*,[1] pleas claiming rights for the public to enter upon Newmarket Common and stay there to witness horse-races were held bad, Cockburn, C. J., remarking: "A customary right can only be applicable to certain inhabitants of the district where the custom is alleged to exist, and cannot be claimed in respect of the public at large."

So in *Schwinge* v. *Dowell*,[2] Wightman, J., told the jury that a plea claiming a right in the inhabitants of the manor of Woodford to walk through the forest "for air and exercise" was disproved rather than proved by proof that "all the world went wherever they pleased."

A custom or customary by-law, whereby the commoners of a manor might take or destroy rabbits or game on the waste, is not necessarily void for unreasonableness. But a custom for any person, not merely any copyholder, to kill rabbits on a manor without molestation would be on the face of it unreasonable.[3]

There cannot be a valid custom for the fishermen of an ancient borough to appropriate a portion of the foreshore for the purpose of storing oysters to the exclusion of the rest of the public, for this would be in derogation of the public "right of fishing" in the sea.[4]

(ii.) Next the plaintiff must, of course, show that he is one of the persons entitled to the right claimed.

(iii.) Then he must prove that the defendant has materially obstructed or disturbed him in the exercise of his right. It is not enough for him to show that the defendant has done something which if constantly repeated will ultimately amount to such a disturbance or obstruction. A mere apprehension of damage will not suffice.

If one commoner puts more cattle on the common than he is entitled to do, he is liable to be sued by all or any one of the other commoners who have a right to depasture beasts upon the same common; and it is no answer to the action that the plaintiff has himself surcharged the common, or that the damage is insignificant; for the wrongdoer might, by repeated torts of this sort, eventually enlarge his right. But if the beasts have been put upon the common by the lord of the manor or with his licence and permission, the commoner cannot maintain an action, unless he has sustained actual damage and can show that there was not a sufficiency of pasture for his beasts. Any act that totally destroys the herbage, as feeding innumerable rabbits on a common, will support an action against the lord.[1]

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[1] (1863), 9 L. T. 384.

[2] (1862), 2 F. & F. at pp. 848, 849; and see the Stonehenge Case, *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188.

[3] *Coote* v. *Ford* (1900), 83 L. T. 482.

[4] *Corporation of Truro* v. *Rowe*, [1902] A. C. 709.

If a commoner sue for a nuisance to the common (*e.g.*, where the defendant has dug a pit in the common), he must prove that his enjoyment of his right of common has thereby been appreciably impaired, as otherwise he has no cause of action.[2]

So an action will lie by a commoner against a stranger for putting his cattle on the common and thus preventing him from enjoying his right to the full. In such an action the defendant pleaded a licence from the lord to put his cattle there, but he did not aver that there was sufficient common left for the commoners; this was held to be no good plea, for the lord had no right to give a stranger such a licence unless there was enough common left for the commoners.[3]

The lord of a manor by deed leased the right to train and gallop horses on the waste of the manor. It was held that he would not be liable for damage done to the rights of common of pasturage of the copyholders by the lessee, unless it was proved that the lessee caused the damage as the lord's agent or with his licence; and that the mere fact that the lord had given such a licence did not of necessity involve injury to the right of the commoners to pasture their cattle thereon.[4]

V. NATURAL RIGHTS.

There are other rights attached to the occupation or ownership of land which do not depend in any way upon a grant express or implied or upon any long-continued user, but are incident to the property in the land. These are called "natural rights;" they are in fact involved in the conception of ownership, they are fragments of dominion. Chief among them are the right of support to land in its natural condition and the right to the flow of a stream down its natural watercourse.

(a) *Right of Support.*

Every owner of land has a natural right to the support of the subjacent soil and also of the adjacent land. Any person who deprives him of either of these rights commits a tort for which he is liable in damages, and, whenever the subsidence is substantial, the injured party in order to succeed need not prove that he has sustained any actual damage.[1]

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[1] *Wells* v. *Watling* (1778), 2 W. Bl. 1233.

[2] *Per* Lord Holt, C.J., in *Ashby* v. *White* (1703), 1 Sm. L. C., 12th ed., at p. 289; *Robert Marys's Case* (1612), 9 Rep. 111 b, 113 a; Co. Litt. 56 a.

[3] *Smith* v. *Feverell* (1675), 2 Mod. 6; 1 Freeman's R. 190; *Greenhow* v. *Ilsley* (1746), Willes, 619.

[4] *Coote* v. *Ford* (1900), 83 L. T. 482.

It is obvious that "if neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of all support on all sides could not stand by its own coherence alone."[2] Such an excavation is therefore tortious, unless the landslip be caused, not by the weight of the land itself, but by the weight of houses built upon it. For the natural rights both of subjacent and adjacent support exist only in favour of land in its natural state unweighted by buildings. If, however, the land would have fallen in by reason of the excavation, whether any buildings had been built on it or no, an action of tort will lie. And in such an action the value of the buildings can be recovered, even though no easement had yet been acquired which entitled the buildings to support, as their fall was caused by the subsidence of the land which was the result of the tortious excavation.[3]

The right of support by subjacent land can, of course, only give rise to an action when the surface and subsoil are vested in different owners or occupiers. "In the natural state of land one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural and is necessary, so long as the *status quo* of the land is maintained; and therefore, if one parcel of the land be conveyed so as to be divided in point of title from another contiguous to it, or (as in the case of mines) below it, the *status quo* of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself—a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant—a right for injury to which an adjoining proprietor is responsible."[4]

This natural right can be surrendered by agreement. Permission to let down adjacent or superior soil is sometimes granted on special terms in mining leases,[1] but there must be clear words indicating an intention to confer such a right in derogation of the ordinary and *primâ facie* right of support.[2] Whether a right to do this can be acquired by prescription or custom is very doubtful.

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[1] *Bonomi* v. *Backhouse* (1861), 9 H. L. Cas. 503; *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, 311.

[2] *Per cur.* in *Humphries* v. *Brogden* (1850), 12 Q. B. at p. 744; and see *Elliot* v. *N. E. Ry. Co.* (1863), 10 H. L. Cas. 333; *Caledonian Ry. Co.* v. *Sprot* (1856), 2 Macq. 449.

[3] *Wyatt* v. *Harrison* (1832), 3 B. & Ad. 871; *Hunt* v. *Peake* (1860), 29 L. J. Ch. 785; *Stroyan* v. *Knowles* (1861), 6 H. & N. 454.

[4] *Per* Lord Selborne, L.C., in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 791; and see *Rowbotham* v. *Wilson* (1857), 8 E. & B. 123; *Dixon* v. *White* (1883), 8 App. Cas. 833.

The right of support for land weighted by buildings, on the other hand, is not a natural right but an easement. Such an easement—unlike a natural right of property—must be acquired and, until it has been secured either by grant or prescription at common law or by statute, its acquisition may be prevented by any person interested. Thus, where a house has not stood for twenty years, "the owner of the adjacent soil may with perfect legality dig that soil away and allow his neighbour's house, if supported by it, to fall in ruins to the ground;"[4] and if a house, not being "ancient" in law, is supported by the buildings of a neighbour, on the same principle the neighbour will not be liable for any damage caused by his pulling down his buildings and so withdrawing the support needed by the house, unless the pulling down is performed so negligently and violently as to amount to a trespass upon the adjoining property.[5] When, however, the easement has once been acquired, it will stand upon the same footing as a natural right of property, and any infringement thereof will be punished at law either by damages for the unlawful acts, or an injunction to prevent their repetition.

"Support to that which is artificially imposed upon land cannot exist *ex jure naturæ*, because the thing supported does not itself so exist; it must in each particular case be acquired by a grant, or by some means equivalent in law to a grant, in order to make it a burden upon a neighbour's land, which (naturally) would be free from it. This distinction (and at the same time its proper limit) was pointed out by Willes, J., in *Bonomi* v. *Back-*

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[1] As to mines under land taken under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), see *G. W. Ry. Co.* v. *Bennett* (1867), L. R. 2 H. L. 27; *Midland Ry. Co.* v. *Robinson* (1889), 15 App. Cas. 19; *Manchester Corporation* v. *New Moss Colliery, Ltd.*, [1906] 2 Ch. 564; [1908] A. C. 117.

[2] *Dugdale* v. *Robertson* (1857), 3 Kay & J. 695; *Davis* v. *Treharne* (1881), 6 App. Cas. 460; *Love* v. *Bell* (1884), 9 App. Cas. 286.

[3] *Hilton* v. *Earl Granville* (1845), 5 Q. B. 701; *Duke of Buccleuch* v. *Wakefield* (1869), L. R. 4 H. L. 377; *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159.

[4] *Per* Lord Penzance in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 804.

[5] See *Chadwick* v. *Trower and others* (1839), 6 Bing. N. C. 1; *Magor and others* v. *Chadwick* (1840), 11 A. & E. 571; *Bibby* v. *Carter* (1859), 4 H. & N. 153.

house,[1] where he said, 'The right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as a matter of grant, whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights when acquired is in each case the same.' Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property in precisely the same way as when he has granted a right of support to buildings. The right therefore, in my opinion, is properly called an easement."[2]

In the case, from which the above passage is cited, the House of Lords decided that a twenty years' enjoyment, *nec vi*, *nec clam*, *nec precario*, was sufficient at common law to confer a right of support to buildings as against neighbouring land. In dealing with the question whether the enjoyment of such support was not, in effect, a secret enjoyment, Lord Selborne said, "There are some things of which all men ought to be presumed to have knowledge, and among them (I think) is the fact that, according to the laws of nature, a building cannot stand without vertical or (ordinarily) without lateral support." In the same case Lord Selborne (with whom Lord Coleridge, C. J., concurred) laid it down that such a right of support was an easement within the meaning of section 2 of the Prescription Act; and in a subsequent case it was held that the right of support for buildings could also be acquired against buildings as opposed to land, and was within section 2 of the Act.[3]

This principle was applied in Ireland to impose a liability upon the owner of a building separated from that of the plaintiff by an intervening house. It was there held that, as the evidence showed that the injury was caused by the rebuilding of the defendant's premises, he was liable for the damage suffered by the plaintiff, even though the rebuilding had been performed with due skill.[4]

(b) *Right to the Flow of Water.*

Next as to the right to the use and enjoyment of running water possessed by a riparian proprietor.[5] *Primâ facie* the owner of each bank of a stream is the owner of half the land covered by the stream, but there is no property in the water.

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[1] (1858), E. B. & E. at pp. 654, 655; affirmed (1861), 9 H. L. Cas. 503; and see *Spoor* v. *Green* (1874), L. R. 9 Ex. 99, 111.

[2] *Per* Lord Selborne, L.C., in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 792; and see the remarks of Lord Campbell in *Humphries* v. *Brogden* (1850), 12 Q. B. at p. 742.

[3] *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281.

[4] *Latimer* v. *Official Co-operative Society* (1885), 16 L. R. Ir. 305, distinguishing *Solomon* v. *The Vintners' Co.* (1859), 4 H. & N. 585.

[5] A riparian proprietor is a person who owns land abutting on a river.

"Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other proprietors above or below on the stream."[1]

The soil of the bed of a river is not the common property of the respective owners on the opposite sides of it; the share of each belongs to him in severalty and extends *usque ad medium filum aquæ*; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream.

A fence or bulwark on the bank is allowable, but any permanent encroachment on the bed of the river by one proprietor is actionable, as in time of flood it may cause destruction of the opposite bank; and the *onus* of proving that the act is not an encroachment falls on the party doing it, who is *primâ facie* held responsible. Mere apprehension without some show of injury will not ground a complaint, but it is not necessary to show that any damage has been sustained.[2]

Every riparian proprietor—and indeed every person who lives on the banks of a natural stream[3]—is entitled in his turn to have the water of a natural stream transmitted to him without sensible alteration in its character or quality. Any substantial invasion of this right entitles the party injured to the intervention of the Court.[4] An action will also lie for fouling the water to the use of which the plaintiff is entitled,[5] unless a right to pollute the stream has been acquired by prescription or custom.[6] And if a stream be diverted by altering its course or cutting down its banks, or if the water be abstracted from it for unauthorised purposes, the owner will have his right of action against the wrongdoer. The question in all these cases is this: "Does the use which the defendants make of the water sensibly affect, or is it if continued capable of sensibly affecting, the plaintiff's right to have the stream flow down to him undiminished in quantity and undeteriorated in quality?"[1] If so, no actual pecuniary loss need be proved.

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[1] *Per cur.* in *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S. at pp. 611, 612; and see *Embrey* v. *Owen* (1851), 6 Exch. 353, 369; *Orr-Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, 855. As to what is a reasonable use of the water see *McCartney* v. *Londonderry, &c., Ry. Co.*, [1904] A. C. 301; *John White & Sons* v. *White*, [1906] A. C. 72; *Stollmeyer* v. *Trinidad, &c., Co.*, [1918] A. C. 485.

[2] *Bickett* v. *Morris* (1866), L. R. 1 H. L. Sc. 47. This is a Scotch case, but Lord Cranworth expressly says at p. 58 that the law of England is the same.

[3] *Lyon* v. *Fishmongers' Co.* (1876), 1 App. Cas. 662; followed in *North Shore Ry. Co.* v. *Pion* (1889), 14 App. Cas. 612.

[4] *John Young & Co.* v. *Bankier Distillery Co.*, [1893] A. C. 691.

[5] *Laing* v. *Whaley* (1858), 3 H. & N. 675, 901; *Hodgkinson* v. *Ennor* (1863), 4 B. & S. 229.

[6] *Carlyon* v. *Lovering* (1857), 1 H. & N. 784; *Gaved* v. *Martyn* (1865), 19 C. B. N. S. 732; *Liverpool Corp.* v. *Coghill & Son, Ltd.*, [1918] 1 Ch 307.

"All streams are *publici juris*, and all the water flowing down any stream is for the common use of mankind who live on the banks of the stream; and therefore any person living on the banks of the stream has an undoubted right to the use of the water for himself, his family and his cattle, and for all ordinary domestic purposes, such as brewing, washing and so on. . . . It has been settled that actual pecuniary damage is not necessary to give a right of action or suit, because it is sufficient to show that the defendants are interfering with that which is a right, and in a mode which may give a future legal right to interfere with the stream when it may be wanted, or may in a pecuniary point of view be useful to the riparian proprietor below."[2]

In the case of *Ormerod* v. *Todmorden Mill Co.*[3] the jury found that water had been abstracted by the defendants and heated, and then returned into the stream, but that the plaintiffs had sustained no actual damage. The learned judge held that the latter finding was immaterial, and directed judgment for the plaintiffs on the ground that "as the defendants claim to do this continuously as a matter of right, it is not necessary for the plaintiffs to prove that they have sustained actual damage."

"Even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet if an obstruction be made to the current of a stream, that obstruction is . . . an encroachment which adjacent proprietors have a right to have removed."[4]

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But further he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."[1]

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[1] This was one of the questions left to the jury by Cave, J., in *Ormerod* v. *Todmorden Mill Co.* (1883), 11 Q. B. D. at p. 158.

[2] *Per* James, L.J., in *Wilts, &c., Canal Co.* v. *Swindon Waterworks Co.* (1874), L. R. 9 Ch. at pp. 457, 458.

[3] (1883), 11 Q. B. D. 155, 159; and see *Wilts, &c., Canal Co.* v. *Swindon Waterworks Co.* (1875), L. R. 7 H. L. 697, 704.

[4] *Per* Lord Westbury in *Bickett* v. *Morris* (1866), L. R. 1 H. L. Sc. at p. 62.

"The right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case, each successive riparian proprietor is *primâ facie* entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin."[2]

In fact, where the stream is not a natural but an artificial one, the plaintiff must establish an easement entitling him to the flow of water. If an artificial watercourse be made merely for temporary purposes, no action will lie for its obstruction, even though the plaintiff prove long enjoyment of its uninterrupted flow; for the fact that the stream was created for temporary purposes precludes a presumption of a grant of a permanent right.[3] But if the artificial watercourse be of a permanent nature, a right to the uninterrupted flow of water along it may be acquired by prescription or grant. And moreover in this case rights in the nature of easements may also be acquired therein by the owner of the land on to which the water flows; he can acquire the right to prevent the man, who made the watercourse, from polluting the water to his injury.

Thus the flow of water from the eaves of a house would not give a right to the neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof; nor would the flow of water during twenty years from a drain made for the purposes of agricultural improvements give a right to the neighbour, which would prevent the proprietor from altering the level of his drains for the greater improvement of his land. In such a case the one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right.[1]

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[1] *Per* Lord Kingsdown in *Miner* v. *Gilmour* (1858), 12 Moo. P. C. C. at p. 156; cited with approval in *Nuttall* v. *Bracewell* (1866), L. R. 2 Ex. at pp. 9, 13; and in *Commissioners of French Hoek* v. *Hugo* (1885), 10 App. Cas. at p. 344.

[2] *Per cur.* in *Singh* v. *Pattuk* (1878), 4 App. Cas. at p. 126; cited with approval by Farwell, J., in *Burrows* v. *Lang*, [1901] 2 Ch. at p. 507.

[3] *Wood* v. *Waud* (1849), 3 Exch. 748. See also *Burrows* v. *Lang*, [1901] 2 Ch. 502; *Whitmores* (*Edenbridge*), *Ltd.* v. *Stanford*, [1909] 1 Ch. 427.

Where the owners of a canal, fearing that damage would be done to their premises by the overflow of flood-water from a neighbouring river, penned back the water and thus caused the plaintiff's premises above them to be flooded, it was held that no action for compensation would lie, because the water which did the damage was not brought into the canal by the defendants, and no duty was imposed upon them analogous to that imposed upon the owners of a natural watercourse not to impede the flow of waters down it.[2] It has similarly been held that a man may, without regard to his neighbour, protect himself against subterranean water, a canal or the sea, as against "a common enemy," but not against a river.[3]

The rules which regulate the right to subterranean water differ from those applicable to the enjoyment of streams and waters above ground. When water is on the surface, the owner of the adjoining land has a right to use the water; and so he has in the case of a subterranean stream, if its course be well known. Thus, where a stream sinks underground, pursues for a short space a subterranean course and then emerges again, the owner of the soil under which the stream flows can maintain an action for any diversion of it which took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground.[4] A different rule, however, prevails where water is percolating underground through channels which are unknown and possibly unascertainable.

Thus, if A. sinks a well on his own land, it is impossible to say how much of the water which runs into it belonged to

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[1] *Wood* v. *Waud* (1849), 3 Exch. 748, 776; approved in *Singh* v. *Pattuk* (1878), 4 App. Cas. 121; distinguished in *Beeston* v. *Weate* (1856), 5 E. & B. 986, 995, where there was evidence that an easement had been acquired; and see *Chamber Colliery Co.* v. *Hopwood* (1886), 32 Ch. D. 549.

[2] *Nield* v. *L. & N. W. Ry. Co.* (1874), L. R. 10 Ex. 4; *John White & Sons* v. *White*, [1906] A. C. 72.

[3] *Smith* v. *Kenrick* (1849), 7 C. B. 515; *R.* v. *Pagham Commissioners* (1828), 8 B. & C. 355, 360; *R.* v. *Trafford* (1832), 8 Bing. 204, 210; but see *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (1884), 13 Q. B. D. 131.

[4] See the remarks of Pollock, C. B., in *Dudden* v. *Clutton Union* (1857) 1 H. & N. at p. 650; and see *Black* v. *Ballymena Commissioners* (1886), 17 L. R. Ir. 459. An action will also lie against a landowner for polluting underground water, so as to render it unfit for use: *Snow* v. *Whitehead* (1884), 27 Ch. D. 588; *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 117.

A. when the ground was in its natural state, and how much to his neighbour. His neighbour has as good a right as A. to dig a well on his own land, even though by so doing he may drain back water out of A.'s well.[1]

The plaintiff was the owner of an ancient mill on the river Wandle, and for more than sixty years before the commencement of the action he and all the preceding occupiers of the mill had used and enjoyed, as of right, the flow of the river for the purpose of working their mill. The river above the plaintiff's mill was and always had been supplied in part by water produced by the rainfall on Croydon and its vicinity. This water used to sink into the ground to various depths, and then to flow and percolate through the *strata* to the river, part rising to the surface and part finding its way underground in courses which constantly varied. The Croydon Local Board of Health, in order to supply their town with water, sank a well in their own land about a quarter of a mile from the river, and pumped up large quantities of water from it. It was held that the plaintiff could not maintain an action against the defendant for thus diverting the underground water.[2] "In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another founded upon length of enjoyment is supposed to have originated in some grant, which is presumed, from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, i at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickinson* v. *The Grand Junction Canal Company*,[3] expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturæ.* If so, *à fortiori* the right, if it exists at all in the case of subterranean percolating water, is *jure naturæ*, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference.

"The question then is, whether the plaintiff has such a right as he claims *jure naturæ* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff's mill. It is impossible to reconcile such a right with the natural and ordinary right of landowners, or to fix any reasonable limits to the exercise of such a right. . . . Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded or that the present action is maintainable."[1] The House of Lords affirmed the judgment of the Court below in the defendant's favour.

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[1] *Acton* v. *Blundell* (1843), 12 M. & W. 324.

[2] *Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349. In this case *Acton* v. *Blundell, suprà,* is recognised, and the authorities generally are reviewed.

[3] (1852), 7 Exch. 282.

Every owner of land has a right to divert or appropriate the water percolating within his own land, whether his motive be to improve his own land or to maliciously injure his neighbour.[2]

(c) *Other Natural Rights.*

There are other natural rights which "are *ab initio* incident to the right of property."[3] For instance, every owner of land "has a natural right to enjoy the air pure and free from noxious smells or vapours and any one, who sends on to his neighbour's land that which makes the air impure, is guilty of a nuisance."[4] But no man has a right to the access of the open air across his neighbour's land to his land in a lateral direction. Thus the owner of a windmill cannot prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, though the mill has been worked thus for over twenty years.[5] Nevertheless, a man may by long-continued use acquire a right to the access of air along "some definite channel constructed for the purpose of containing and communicating it."[4] Again, no man has a right to have the view or prospect from his house preserved for his enjoyment; the owners of the adjoining land are entitled to build so as to block it out, provided they do not materially interfere with the access of light to his ancient windows. There can be no easement of prospect apart from an express covenant by the grantor.[6]

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[1] *Per cur.* in *Chasemore* v. *Richards* (1859), 7 H. L. Cas. at pp. 370, 372.

[2] *Corporation of Bradford* v. *Pickles,* [1895] A. C. 587; *ante*, pp. 409, 410.

[3] *Per* Farwell, J., in *Higgins* v. *Betts,* [1905] 2 Ch. at p. 215.

[4] *Per* Lopes, L.J., in *Chastey* v. *Ackland,* [1895] 2 Ch. at pp. 396, 397; and see *ante*, p. 506.

[5] *Webb* v. *Bird* (1862), 13 C. B. N. S. 481; and see *Harris* v. *De Pinna* (1886), 33 Ch. D. 238.

[6] *Aldred's Case* (1610), 9 Rep. 57a, 58b; *Att.-Gen.* v. *Doughty* (1752), 2 Ves. Sen. 453; and see the remarks of Lord Blackburn in *Dalton* v. *Angus* (1881), 6 App. Cas. at p. 823.

CHAPTER XIV.

INFRINGEMENT OF PATENTS, COPYRIGHTS, &c.

THERE are certain rights which are growing more and more important every day, and to which we must devote a separate chapter. We refer to the exclusive right to manufacture and use a particular invention, the exclusive right to make copies of a book, poem, play, picture or design, and the exclusive right to attach to goods a particular trade mark, or to prevent any one else from selling goods under a name well known in the trade. Such acts may be innocent in themselves, but they become wrongful whenever the law has given to another person the sole right to do these acts.

These exclusive rights are sometimes disrespectfully styled "monopolies." They are really a kind of intangible property, and it is on that ground that they are protected by our Courts. Formerly our judges refused to regard an exclusive right to prevent others from doing something as property at all, though they granted protection on other grounds.

But the correct view was stated by Lord Westbury, L. C., in the case of *The Leather Cloth Co.* v. *The American Leather Cloth Co.*,[1] where, speaking of a trade mark, he makes use of the following words:—"I cannot assent to the *dictum* that there is no property in a trade mark. It is correct to say that there is no exclusive ownership of the symbols which constitute a trade mark apart from the use or application of them, but the term 'trade mark' is the designation of marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property. The true principle therefore seems to be, that the jurisdiction of the Court in the protection given to trade marks rests upon property, and that the Court interferes by injunction because that is the only mode by which such property can be effectually protected."

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[1] (1863) 33 L. J. Ch. at p. 201.

An action for the infringement of any such right closely resembles an action of trespass. To succeed in such an action the plaintiff has only to establish that he possesses the right and that the defendant has violated it. He need not prove that the defendant acted fraudulently or maliciously; and where the defendant was unaware of the existence of the right which he has violated, the plaintiff can still as a rule obtain an injunction, though not damages.[1] Nor need the plaintiff show that he has suffered any special damage from the defendant's act; it is sufficient if he prove facts from which it may properly be inferred that some damage must result.[2]

We will deal first with patent rights.

I. PATENT RIGHTS.

The Crown has power under its Royal prerogative to grant to a man the exclusive right to "make, use, exercise and vend" a new manufacture within the realm. This prerogative was preserved to the Crown by the Statute of Monopolies, which, while abolishing all other monopolies, sanctioned "any letters patent and grants of privilege for the term of fourteen years or under of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use."[3] This right is generally called a "patent right," because it is conferred by letters patent The Patent and Designs Act, 1907,[5] consolidated the law on this subject. By section 18 of this Act the owner of such a right, be he the original inventor or his assign, may apply to the High Court for an extension of the term of his patent. But the Court will only grant such extension when it is satisfied that the patentee has been inadequately remunerated by his patent.[1]

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[1] See 7 Edw. VII. c. 29, s. 33.

[2] *Exchange Telegraph Co.* v. *Gregory & Co.*, [1896] 1 Q. B. 147, 153, 156.

[3] 21 Jac. I. c. 3, s. 6. Section 4 of the same Act gives a right of action to any one who is "hindered, grieved, disturbed or disquieted . . . by occasion or pretext of any monopoly or of any . . . letters patent," except of course such as are validly granted under s. 6: see *Peck* v. *Hindes, Ltd.* (1898), 67 L. J. Q. B. 272.

[4] For the form of a patent, see the Third Schedule to the Patent Rules, 1903.

[5] 7 Edw. VII. c. 29.

In order to obtain a patent the applicant must leave at the Patent Office an application in the prescribed form. This application must be signed by him, and must contain a declaration that he is possessed of an invention, of which he is the true and first inventor and for which he desires to obtain a patent.[2] It must be accompanied either by a provisional or complete specification. "A provisional specification must describe the nature of the invention; a complete specification must particularly describe and ascertain the nature of the invention and the manner in which the same is to be performed."[3] In short, in a complete specification the applicant must state exactly what it is which he claims to have invented and give all particulars which are necessary to enable others to manufacture it after the period of protection has expired. If the applicant lodges a provisional specification with his application, he must deposit a complete specification within six months, or within such extended time—not exceeding a month—as the Comptroller of Patents may permit.[4] The application and complete specification are then referred to an examiner, whose duty it is to report to the Comptroller whether the specification is satisfactory in form, and whether the invention claimed has been claimed by any one else, &c. On the report of the examiner the Comptroller may either accept or reject the application or require it to be amended. He must accept it, if at all, within twelve months of the application, otherwise the application lapses. The acceptance, as soon as it is made, is advertised, and the application and specification become open to public inspection.[5] Any person entitled to object to the grant of the patent may notify his intention of doing so. This notification must be communicated to the applicant, and the objection is heard by the Comptroller, from whose decision there is an appeal to a law officer of the Crown.[6] If there is no objection, or if the objection fails, the patent is granted, and the invention is provisionally protected until the patent is sealed.[7] It is sealed with the seal of the Patent Office, and the grant of it is recorded in the Register of Patents.[8] The patent is then forwarded to the patentee, together with a printed copy of his specification and drawings.

But if "the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom," application may after four years from the date of the patent be made to the Comptroller for its revocation either immediately or at a reasonable time after the application.[1] If, however, the patentee can satisfy the Comptroller (or, on appeal from him, the Court) that he has done his best to comply with the directions of the Act, the patent will not be revoked.[2]

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[1] See *In re Frieze-Green's Patent*, [1907] A. C. 460; *In re Johnson's Patent*, [1909] 1 Ch. 114.

[2] S. 1.

[3] S. 2.

[4] S. 5.

[5] Ss. 6, 7.

[6] S. 11.

[7] S. 4.

[8] Ss. 12—14.

The invention for which a patent is asked must of course be novel "within this realm;"[3] the applicant must declare that he is the true and first inventor or the assign of the inventor, and that the invention "is not in use by any other person to the best of his knowledge and belief." Then the invention must be such that it is a proper subject for the grant of a patent. It must be the invention of some manufacture or art. Abstract ideas cannot be patented, nor can mere scientific discoveries. The discoverer must also manufacture some thing by means of which the public can derive benefit from the discovery. "An invention is not the same thing as a discovery. . . . A man who discovers that a known machine can produce effects which no one before him knew could be produced by it may make a great and useful discovery; but if he does no more, his discovery is not a patentable invention. He has added nothing but knowledge to what previously existed. A patentee must do something more: he must make some addition not only to knowledge, but to previously known inventions, and must so use his knowledge and ingenuity as to produce either a new and useful thing or result, or a new and useful method of producing an old thing or result."[4] Lastly, the invention must be useful; it must be "for the public good." The patent cannot be supported unless the invention, when put into practice, is useful for the purpose indicated by the patentee.[5] But a very small degree of utility will be sufficient.[6]

In an action for the infringement of a patent the burden rests upon the plaintiff to prove two things:—

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[1] S. 27.

[2] See *In re Bremer's Patent*, [1909] 2 Ch. 217.

[3] 21 Jac. I. c. 3, s. 6; *Brown* v. *Annandale* (1842), 8 Cl. & F. 437.

[4] *Per* Lindley, L. J., in *Lane Fox* v. *Kensington, &c., Lighting Co.*, [1892] 3 Ch. at pp. 428, 429.

[5] *Wilson* v. *Union Oil Mills* (1892), 9 R. P. C. at p. 20.

[6] *Welsbach* v. *New Incandescent Co.*, [1900] 1 Ch. 843.

(i.) that he is the original grantee, or the duly constituted assign of the original grantee, of letters patent;[1] and

(ii.) that the defendant has infringed the right conferred by those letters patent.

(i.) The plaintiff must in the first place prove his patent. This he can do by putting in a printed or written copy or extract, certified by the Comptroller of Patents and sealed with the seal of the Patent Office.[2] A patent may be granted to two or more co-owners jointly for an invention made by one or some of them,[3] in which case each of them, in the absence of any special agreement, may use and work the patent for his own profit,[4] and each therefore may maintain an action for its infringement.[5] If the plaintiff be not the original patentee, he must formally prove the various assignments by which the patent right has been transferred from the original patentee to himself.

If the defendant has denied the novelty of the invention, it was formerly held that the plaintiff must, in the first instance, give some slight evidence of this by calling some one conversant with the trade to state that the invention was unknown before the letters patent were granted.[6] But the modern practice is that the plaintiff establishes a *primâ facie* case on this issue by proving his patent. He thus throws the burden of proof on the defendant, who must show, if he can, some prior use of the invention in this country, or some prior publication in this country of some intelligible description of the plaintiff's invention.[7] The production of the letters patent is *primâ facie* proof that they were rightly granted, and that all facts existed necessary to bring the case within section 6 of 21 Jac. I. c. 3.[8]

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[1] One of several co-owners of a patent may sue alone for an infringement of his right: *Sheehan* v. *G. E. Ry. Co.* (1880), 16 Ch. D. 59; and so may one of several co-owners of a trade mark: *Dent* v. *Turpin* (1861), 30 L. J. Ch. 495.

[2] S. 79; and see s. 78.

[3] S. 1.

[4] *Steers* v. *Rogers*, [1892] 2 Ch. 13.

[5] *Sheehan* v. *G. E. Ry. Co.* (1880), 16 Ch. D. 59; *Van Gelder Co.* v. *Sowerby Bridge Society* (1890), 44 Ch. D. 374.

[6] *Turner* v. *Winter* (1787), 1 T. R. 602; but see *Penn* v. *Jack* (1866), L. R. 2 Eq. 314.

[7] See *Harris* v. *Rothwell* (1887), 35 Ch. D. at p. 427.

[8] *Amory* v. *Brown* (1869), L. R. 8 Eq. 663.

(ii.) The question of infringement is one of mixed fact and law, but often more a question of fact than of law. Any use of the article or invention which is the subject of the plaintiff's patent without his leave, any application of it for the defendant's own profit except by way of *bonâ fide* experiment, is an infringement.[1] The question is "whether the mode of working by the defendant is essentially or substantially different."[2] A slight deviation from the process described in the specification made by the defendant for the purpose of evading the patent will not protect the defendant; for it is a fraud. If the defendant substitutes a well-known equivalent, chemical or mechanical, for any part of the invention, this is a mere colourable variation and therefore the goods which he sells are still an infringement. A patent for a combination of several things, old and new, is infringed by an imitation of that part which is new.[4] But where the patent is for a new result coupled with an effectual process, the use of any other process attaining the same result is an infringement.[5] It is no infringement to sell the separate parts of a patented combination with the knowledge that they will be used by the purchaser to form the combination.[6]

It is an infringement to import from abroad articles there made by the patented process;[7] but an agent who merely passes such goods through the custom house and obtains leave to store them in the importer's warehouse is not guilty of any infringement.[8] Where articles infringing a patent are made abroad, the Court has no jurisdiction to restrain the foreign manufacturer, even though he made them with the intention of sending them to England; and he himself does not infringe the patent.[9] Evidence that the defendant imported into England and sold here articles in imitation of the patented article is evidence of infringement, whether the defendant knew that they had been copied from the patented article or not.[1]

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[1] *Frearson* v. *Loe* (1878), 9 Ch. D. 48, 66, 68.

[2] *Per cur.* in *Hill* v. *Thompson* (1818), 8 Taunt. at p. 391.

[3] *Dudgeon* v. *Thomson* (1877), 3 App. Cas. 34.

[4] *Sellers* v. *Dickinson* (1850), 5 Exch. 312.

[5] *Badische, &c., Fabrik* v. *Levinstein* (1883), 24 Ch. D. 156; affirmed (1887), 12 App. Cas. 710.

[6] See the extract of the judgment of Jessel, M. R., in *Townsend* v. *Haworth* (1875), cited in the note to *Sykes* v. *Howarth* (1879), 12 Ch. D. at p. 831.

[7] *Von Heyden* v. *Neustadt* (1880), 14 Ch. D. 230.

[8] *Nobel's Explosives Co.* v. *Jones* (1882), 8 App. Cas. 5.

[9] *Badische, &c., Fabrik* v. *Basle Chemical Works*, [1898] A. C. 200.

It will be open to the defendant to urge at the trial that he never infringed the plaintiff's letters patent. He may also contend that the patent is invalid on the following grounds :—

(a) that the patent was obtained by fraud, *e.g.*, by false suggestion or recital in the letters patent ;

(b) that the inventor has not by his complete specification particularly described the nature of his invention, or that the provisional specification did not describe its true nature, or that the invention which it described is not the same as that described in the complete specification ;

(c) that the said alleged invention is not new ;[2]

(d) that the said alleged invention is not the proper subject-matter of letters patent ;[3]

(e) that the plaintiff is not the first and true inventor of the said alleged invention ; or

(f) that the alleged invention is not useful.

He may also on the same grounds claim the revocation of the plaintiff's patent or counterclaim for damages on the ground that he holds a patent which the plaintiff has infringed.[4]

The procedure in an action for the infringement of a patent[5] is minutely regulated by the Patents and Designs Act, 1907, and by Order LIII.A of the Rules of the Supreme Court made thereunder. The plaintiff usually claims damages as well as an injunction to restrain future infringement. If he succeeds, he may elect whether he will have a decree for an inquiry as to the damage which he has sustained and payment of the amount so assessed, or a decree for an account and payment of the profits made out of the infringement of his patent. He cannot, however, get both against the same defendant.[1] If the defendant can show that he was not aware, and had not reasonable means of making himself aware, of the existence of the patent he will not be liable to pay damages for the infringement, although the patentee can obtain an injunction restraining him from any further infringement.[2] But the plaintiff will not be entitled to an injunction if the Court is satisfied that no danger of future infringement exists.[3] If, however, an infringement be threatened by the defendant, the Court will grant an injunction although no actual infringement has yet taken place.[4]

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[1] *Walton* v. *Lavater* (1860), 29 L. J. C. P. 275.

[2] See *Rolls* v. *Isaacs* (1881), 19 Ch. D. 268; *Anglo-American, &c., Co.* v. *King*, [1892] A. C. 367; *Gillette Safety Razor Co.* v. *A. W. Gamage, Ltd.* (1909), 25 Times L. R. 808.

[3] *Harwood* v. *G. N. Ry. Co.* (1862), 2 B. & S. 222; *Murray* v. *Clayton* (1872), L. R. 7 Ch. 570, 584.

[4] S. 32.

[5] The action cannot be brought in the county court: *R.* v. *County Court Judge of Halifax*, [1891] 2 Q. B. 269.

Besides obtaining an injunction to prevent the defendant from further infringing his patent, the plaintiff may, in the discretion of the Court, obtain an order that the infringing articles be destroyed or delivered up to him, or be otherwise so treated as to prevent future infringements.[5] The mere fact that the defendant is in possession of articles which are an infringement of a patent, though it entitles the plaintiff to an injunction, does not entitle him to an order for their destruction or delivery up.[6] The plaintiff may also in the same action sue for the recovery of royalties from any person alleged to be a licensee on making him a defendant.[7]

II. Copyright.

Every man, who wrote a book, poem or any other original composition, had at common law the exclusive right to multiply copies of it, so long as it remained unpublished; and this common law right is now recognised by statute.[8] A statute of Anne gave to authors a further right, viz., the exclusive right of multiplying copies of their works for fourteen years after publication.[9] The Copyright Act, 1842,[10] extended the period of copyright to the author's natural life and seven years after his death, or forty-two years from the date of publication, whichever period was the longer. The period of copyright for any work, whether published or unpublished, has now been enlarged to the life of the author and fifty years after his death by the Copyright Act, 1911,[1] which has repealed practically all earlier statutes dealing with the subject.[2]

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[1] *De Vitre* v. *Betts* (1873), L. R. 6 H. L. 319.

[2] S. 33. Marking the article "patented," &c., is not sufficient notice, unless the year and number of the patent be also given: s. 33.

[3] *Proctor* v. *Bayley* (1889), 42 Ch. D. 390.

[4] *Frearson* v. *Loe* (1878), 9 Ch. D. 48.

[5] *Betts* v. *De Vitre* (1864), 34 L. J. Ch. 289, 291; *Tangye* v. *Scott* (1865), 14 W. R. 386; *Edison Bell Co.* v. *Smith* (1894), 11 R. P. C. 389; *Mabe* v. *Connor*, [1909] 1 K. B. 515.

[6] *United Telephone Co.* v. *London and Globe Telephone Co.* (1884), 26 Ch. D. 766.

[7] *Wilson* v. *Union Oil Mills Co.* (1892), 9 R. P. C. 57.

[8] 1 & 2 Geo. V. c. 46, s. 31; but "nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence," as to which see *Perceval* v. *Phipps* (1813), 2 Ves. & B. 19, 29; *Gee* v. *Pritchard* (1818), 2 Swans. 402.

[9] 8 Anne, c. 19.

[10] 5 & 6 Vict. c. 45, s. 3.

Copyright may also exist in a dramatic or musical composition. The author of any dramatic piece or musical composition,[3] or his assign, has now during the life of the author and for fifty years after his death the sole liberty of representing or performing such piece or composition in public and of making "any record, perforated roll, cinematograph film or other contrivance by means of which the work may be mechanically performed."[4] If he publishes his work as a book, he secures for himself the copyright in the book in addition to the exclusive right of representation or performance.

There is also copyright in engravings and prints, which lasts for the same period. A similar copyright also exists in sculpture, models and casts, and in original paintings, drawings and photographs,[5] and now, under the Act of 1911, in architectural works of art. Lastly, copyright in designs, which was regulated by many former Acts,[6] is now included in the Patents and Designs Act of 1907.

We must however restrict ourselves in the rest of this chapter to literary copyright.

The copyright in a literary work now "means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof." It includes the sole right to produce, reproduce, perform or publish any translation of the work,[7] and in the case of a novel or other non-dramatic work to convert it into a dramatic work by way of performance in public or otherwise.[1]

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[1] 1 & 2 Geo. V. c. 46, s. 3. And see ss. 21, 24.

[2] As to international copyright, see ss. 29 and 30 of the Act.

[3] As to what constitutes a dramatic piece or musical composition, see 5 & 6 Vict. c. 45, s. 42; *Warne & Co.* v. *Seebohm* (1888), 39 Ch. D. 73; *Boosey* v. *Whight,* [1899] 1 Ch. 836; [1900] 1 Ch. 122; *Mabe* v. *Connor, suprà;* and see the judgment of Lord Esher, M. R., in *Fuller* v. *Blackpool Winter Gardens, &c., Co.,* [1895] 2 Q. B. at p. 432.

[4] 1 & 2 Geo. V. c. 46, s. 1 (2).

[5] Ss. 7—11 of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), which imposed penalties on the fraudulent productions or sales of original paintings, drawings and photographs, still remain in force

[6] The most important of these Acts were 46 & 47 Vict. c. 57, and 49 & 50 Vict. c. 37. See also 9 & 10 Geo. V. c. 62, s. 2.

[7] See *Byrne* v. *Statist Co.,* [1914] 1 K. B. 622.

The term "literary work" includes lectures,[2] examination papers,[3] and also "maps, charts, plans, tables and compilations."[4] But not all printed or written matter can be the subject of copyright. The composition must possess some literary value or be the result of literary skill and labour. Thus a race-card cannot be the subject of literary copyright,[5] though a railway time-table can.[6] There can be copyright in private letters if they have any value as literary productions.[7] So there can be copyright in the report in a newspaper of an address delivered at a public meeting transcribed from shorthand notes taken at the time,[8] or in a newspaper article; the practice of newspapers to copy from each other is no justification for such an infringement.[9] If a man exercises his labour and skill in compiling a work from materials which are open to the public, he may acquire copyright for his compilation. But so may any one else who exercises labour and skill in compiling a different work from the same materials, unless he makes an unfair use of the work of his predecessor.[10] There is no copyright in works of a blasphemous, immoral or libellous character.[11]

The author of a work is *primâ facie* the first owner of the copyright. He may assign the right either wholly or partially, and either for the whole term or any part of the copyright, and either generally or subject to limitations, such, for instance, as the reservation of royalties or a share of the profits to himself.[1] He may also grant any interest in the right by licence. Where however the author is employed by some one else to write the work, the first copyright is, in the absence of any agreement,[2] vested in the employer; but in the case of "an article or other contribution to a newspaper, magazine or similar periodical," the employer has the copyright only in the original periodical, and the author can restrain any subsequent reproduction of his work.[3]

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[1] 1 & 2 Geo. V. c. 46, s. 1 (2).

[2] *Abernethy* v. *Hutchinson* (1825), 1 H. & T. 28, 39; *Caird* v. *Sime* (1887), 12 App. Cas. 326; but see s. 2 (1) (v.).

[3] *University of London Press, Ltd.* v. *University Tutorial Press, Ltd.*, [1916] 2 Ch. 601.

[4] S. 35.

[5] *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420; *Chilton* v. *Progress Printing Co.*, [1895] 2 Ch. 29.

[6] *Leslie* v. *Young*, [1894] A. C. 335.

[7] *Macmillan* v. *Dent*, [1907] 1 Ch. 107. As to the publication of private letters which have no literary value, see *Earl of Lytton* v. *Devey* (1884), 54 L. J. Ch. 293.

[8] *Walter* v. *Lane*, [1900] A. C. 539.

[9] *Walter* v. *Steinkopff*, [1892] 3 Ch. 489.

[10] *Pike* v. *Nicholas* (1870), L. R. 5 Ch. 250. Different copyrights can thus be acquired in different arrangements of common materials. See the cases as to street directories, *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; *Morris* v. *Wright* (1870), L. R. 5 Ch. 279.

[11] *Walcot* v. *Walker* (1802), 7 Ves. 1; *Southey* v. *Sherwood* (1817), 2 Mer. 435.

In order to succeed in an action for the infringement of a literary copyright, the plaintiff must prove that he is the present owner of the copyright and that the defendant has infringed his copyright.

On proof of the above facts the plaintiff has four remedies, all of which he may pursue concurrently:—

(a) An action for an injunction.

(b) An action for damages for the infringement.

(c) An action for detinue for the recovery of pirated copies and damages for their detention, or an action of trover for their conversion, for all infringing copies of any work in which copyright subsists are deemed to be the property of the owner of the copyright.[4]

(d) He may also have the importation of pirated copies stopped at the Custom House.[5]

All such proceedings must be commenced within three years after the infringement.[6] It is not necessary for the plaintiff to give direct evidence of any pecuniary loss; for, if his work has any literary value, the infringement of it must do him damage, and, except in the case of an action for damages, it is not necessary for the plaintiff to establish that the defendant was aware of the existence of his copyright and deliberately infringed it.

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[1] The bankruptcy of the assignee of the copyright will not affect the author's right to his royalties or share of the profits: Bankruptcy Act, 1914, s. 60.

[2] Whether there is or is not such an agreement is a question of fact and not of law; it may be implied from the mere facts of employment and payment: *Lawrence and Bullen, Ltd.* v. *Aflalo*, [1904] A. C. 17 (the case of an article in an encyclopædia).

[3] S. 5 (1) (b).

[4] S. 7; and see *Birn Brothers, Ltd.* v. *Keene & Co., Ltd.*, [1918] 2 Ch. 281.

[5] Ss. 6—9. In addition he may take summary proceedings before justices of the peace, under s. 11, to have infringements delivered up for destruction and the infringer punished.

[6] S. 10.

The plaintiff must be either the original owner of the copyright or an assign or licensee of the original owner. Copyright can only be assigned or a licence granted by a writing signed by the owner of the copyright or his authorised agent; the writing need not be under seal or attested.[1] If an author be employed by A. to write for reward, the copyright of the composition, in the absence of any express agreement, will *primâ facie* vest in A. and not in the author. The author cannot, therefore, reproduce it without the leave of A. This rule is, however, modified in the case of a contribution to a newspaper, magazine or similar periodical.

If a foreign author publishes in the United Kingdom an original work which has not previously been published elsewhere, he can now acquire British copyright for it in precisely the same way as if he were a British subject. The language in which the book is written is immaterial, and so is the nationality of the author. Again, if the executor, administrator or assign of a foreign author publishes the book under similar circumstances, he will also acquire British copyright. It is no longer necessary that the author should be temporarily resident in the British dominions at the date of publication. The subsequent production of the same book by the author or his executors in the native country of the author will not affect rights already acquired in the United Kingdom. If a work be written in a foreign language, no one except the author or some person authorised by him can produce, reproduce or publish any translation of it.[2] The authorised translator will possess the copyright in his translation, and can restrain others from copying it.[3]

"In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists, and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then—

(a) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work ;

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[1] S. 5.

[2] S. 1 (2). See *ante*, p. 605.

[3] *Byrne* v. *Statist*, [1914] 1 K. B. 622.

(b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein." [1]

By section 16 of the Copyright Act, 1842, the defendant in an action for infringement of copyright in a book was required, if he disputed the plaintiff's copyright, to give a notice in writing stating the grounds of his objections to the plaintiff's title to copyright. This section has now been repealed, and is not re-enacted by the Copyright Act, 1911. The defendant nevertheless must, it is submitted, under the general rules of pleading now in force, state such objections in the body of his Defence, or in a separate document delivered therewith.[2]

The plaintiff must also prove that the defendant has infringed his copyright. Any unauthorised reproduction of a book, or any substantial part of it, that interferes with the profit and enjoyment which the owner of the copyright may fairly expect to derive from it amounts to an infringement.[3] It makes no difference that the reproduction was merely for gratuitous distribution and not for profit.[4] Printing a copy or selling a copy is an infringement, and it is no answer to a claim for an injunction that at the date of the infringement the defendant "was not aware and had no reasonable ground for suspecting that copyright subsisted in the work." [5]

It is an infringement of the copyright in a book to import into any part of the British dominions any pirated copy of such book for sale or hire, or to knowingly sell, publish or offer for sale or hire, or have in possession for sale or hire, any such pirated copy.[6]

Difficult questions sometimes arise as to the extent to which it is permissible for one author to quote from another. No tort is, of course, committed by an occasional quotation from a prior authority, especially if the source from which it is derived is fairly acknowledged. "But if, in effect, the great bulk of the plaintiff's publication—a large and vital portion of his work and labour—has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice, as the Court can only look at the result and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects."[1]

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[1] S. 6 (3).
[2] See Order XIX. rr. 4, 6, 15.
[3] See *Educational Co. of Ireland* v. *Fallon*, [1919] 1 Ir. R. 62.
[4] *Novello* v. *Sudlow* (1852), 12 C. B. 177.
[5] S. 8.
[6] 5 & 6 Vict. c. 45, s. 17.

But, except in the case of works of fiction,[2] a *bonâ fide* abridgment does not constitute an infringement, if intellectual labour and independent judgment have been bestowed on the condensation and rearrangement of the original;[3] nor is "any fair dealing with any work for the purposes of private study, research, criticism, review or newspaper summary;"[4] nor is "the reading or recitation in public of any reasonable extract from any published work."[5] So writers of books *bonâ fide* intended for the use of schools are allowed considerable latitude in reproducing short passages from copyright books which are not intended for the use of schools.[6]

If an English book is translated into French, and then the defendant translates the French version of it into English, the sale of the re-translation in England will be an infringement of the copyright in the original work.[7]

III. Trade Marks.

Closely resembling copyright is the right to the exclusive use of a particular trade mark, a right which is now entirely statutory.[8] Before January 1st, 1876, this right could only be acquired by the actual user of the mark without any substantial alteration on the same class of goods for a considerable time; the mark had to be such as would distinguish its owner's goods from all other goods of the same class, and must have been placed upon the goods themselves, not merely on packing cases which did not reach retail customers. But since January 1st, 1876, a new and unused mark can be registered, provided that the applicant has a real intention of using it upon the description of goods for which it is registered.

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[1] *Per* Sir W. Page Wood, V.-C., in *Scott* v. *Stanford* (1867), L. R. 3 Eq. at p. 723, commenting on *Cary* v. *Kearsley* (1802), 4 Esp. 169.

[2] *Dickens* v. *Lee* (1844), 8 Jur. 183.

[3] *Gyles* v. *Wilcox* (1740), 2 Atk. 141; *Tonson* v. *Walker* (1752), 3 Swans. 672.

[4] S. 2 (1) (i.).

[5] S. 2 (1) (vi.).

[6] S. 2 (1) (iv.).

[7] *Murray* v. *Bogue* (1852), 17 Jur. 219.

[8] See the Trade Marks Act, 1905 (5 Edw. VII. c. 15).

A trade mark is "a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark."[1] The word "mark" includes "a device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof,"[1] and the sale of any goods so marked imports, in the absence of an express agreement to the contrary, a warranty that the trade mark is genuine and not forged or falsely applied.[2]

The object of a trader in using a trade mark is to distinguish his goods from those of other manufacturers. Hence the mark must be distinctive; it must distinguish the owner's goods from others on the market. "The function of a trade mark is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods—to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. It tells the person who is about to buy, or considering whether he shall buy, that what is presented to him is either what he has known before under the similar name, as coming from a source with which he is acquainted, or that it is what he has heard of before as coming from that similar source."[3]

A register of trade marks is kept at the Patent Office and is open to the inspection of the public. It contains all registered trade marks, with the names and addresses of their proprietors;[4] but no notice of any trust affecting the trade mark is entered on the register. "Each trade mark must be registered in respect of particular goods or classes of goods."[5] "A registrable trade mark must contain or consist of at least one of the following essential particulars:—

(1) The name of a company, individual or firm represented in a special or particular manner;

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[1] 5 Edw. VII. c. 15, s. 3.

[2] Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17.

[3] *Per* Bowen, L. J., in *In re Powell's Trade Mark,* [1893] 2 Ch. at pp. 403, 404.

[4] 5 Edw. VII. c. 15, s. 4.

[5] S. 8.

(2) The signature of the applicant for registration or some predecessor in his business;

(3) An invented word or invented words;

(4) A word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical[1] name or a surname;[2]

(5) Any other distinctive mark, but a name, signature or word or words, other than such as fall within the descriptions in the above paragraphs (1), (2), (3) and (4), shall not, except by order of the Board of Trade or the Court,[3] be deemed a distinctive mark."[4]

There are certain words which the Registrar will not register as a trade mark or as part of a trade mark. He will refuse to register any ordinary English word which is common to the trade or is identical with a trade mark already registered,[5] and also, as a rule, any words which are merely a puffing description of the goods. Thus the words *perfection*[6] and *classic*[7] were refused registration on the ground that they were merely laudatory and also well-known English words. On the other hand, such fancy words as *Bovril*,[8] *Tabloid*,[9] *Solio*,[10] and *Parlograph*,[11] have been recognised as "invented words" and have therefore been allowed to be registered as trade marks. Any scandalous design or any matter the use of which would be contrary to law or morality will also be refused registration.[12]

If a man has an exclusive right to use a particular trade mark, it becomes his property for the purpose of its being applied to goods; and if any other person applies that trade mark or any mark closely resembling it to his own goods, or in any other way appropriates and uses it to the prejudice of its owner, he commits a tort; for his act is a violation of a right of property.[13] In order to succeed in an action to recover damages for such a tort the plaintiff must prove three things—

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[1] Yet the word "Berna," which is the Italian and Spanish name for Berne, has been registered in England: *In re Berna Commercial Motors, Ltd.*, [1915] 1 Ch. 414.

[2] The registration of christian names is now permitted.

[3] See *In re Cadbury's Application*, [1914] 1 Ch. 331.

[4] 5 Edw. VII. c. 15, s. 9.

[5] S. 19.

[6] *In re Joseph Crosfield & Sons, Ltd.*, [1910] 1 Ch. 119, 130.

[7] *In re Sharpe's Trade Mark* (1914), 31 Times L. R. 105. As to the word "Uneeda" see *In re "Uneeda" Trade Mark*, [1901] 1 Ch. 550; [1902] 1 Ch. 783.

[8] *In re Trade Mark No.* 58,405, "*Bovril*," [1896] 2 Ch. 600.

[9] *In re Burroughs, Wellcome & Co.'s Trade Marks*, [1904] 1 Ch. 736.

[10] *In re Eastman Co.'s Trade Mark*, [1908] A. C. 571, 577; 15 R. P. C. 476.

[11] *In re Carl Lindstroem's Trade Mark*, [1914] 2 Ch. 103.

[12] S. 11.

[13] See also the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, *ante*, p. 374.

(i.) that he is the person at present entitled to the use of a trade mark for goods of a particular class;

(ii.) that such trade mark has been duly registered in his name at the Patent Office; and

(iii.) that the defendant has violated the plaintiff's exclusive right to the use of his trade mark.

It is not necessary for the plaintiff to prove special damage, or that there was any fraudulent intention on the part of the defendant.

(i.) Before the Trade Marks Act, 1905,[1] the right to a trade mark, like the right to a trade name, had to be acquired by public user of it; but now an application to have it registered at the Patent Office is made equivalent to such public user.[2] The fact that a trade mark has been registered by A. is *primâ facie* evidence that A. is its owner and has the right to use it.[3] The right to a registered trade mark can be assigned only with the goodwill of the business concerned in the particular goods for which it has been registered, and will determine with that goodwill.[4]

(ii.) No one can commence proceedings for the infringement of a right to a trade mark unless the same has been registered, or unless it was in use before August 13, 1875, and has been refused registration under the Act of 1905.[5]

(iii.) It will be a violation of the plaintiff's right if the defendant has used the trade mark for trading purposes in the United Kingdom, or in any foreign market where the plaintiff's goods circulate, upon or in connection with goods for which the mark is registered and used and which are not the genuine goods of the plaintiff. It is enough if the defendant has used any essential part of the mark or any colourable imitation of it in a way which is calculated to deceive the public. Where A. has registered a picture or device as his trade mark, the use by B. of a similar picture or device will be an infringement, if a purchaser would be thereby induced to purchase B.'s goods in the belief that they are A.'s. The test is not whether there is a similarity between two marks when lying side by side, but whether, when a person sees one mark apart from the other, he may take it for that other.[1] Thus the use of the word *Onsoria* was held to be an infringement of a trade mark consisting of the word *Anzora*:[2] but the word *Swankie* was held not to be an infringement of a trade mark consisting of a picture of a swan together with the word *Swan*, as there was no serious danger of any confusion between the two words.[3] If the Court is satisfied that the trade mark used by the defendant is calculated to deceive purchasers, it is not as a rule necessary for the plaintiff to prove that any purchaser was in fact deceived.[4] A person who uses such a deceptive trade mark is not entitled to any protection in respect of it.[5]

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[1] 5 Edw. VII. c. 15.
[2] Ss. 4, 39.
[3] S. 40.
[4] S. 22.
[5] S. 42.

On proof of the facts (i.), (ii.) and (iii.) above, the plaintiff can recover damages, and in most cases he may also claim an injunction and a declaration of his right to the exclusive use of the trade mark. He may claim an account of the profits made by the defendant from wrongful sales of goods improperly marked with the trade mark; but if he does so, he cannot as a rule obtain damages as well.[6]

IV. TRADE NAMES.

A man's name is that by which others identify him. Any man can take any name which he pleases so long as he can get other people to call him by it—and this in spite of the annoyance which such an act may cause to others who already bear that name.[7] So, too, a man can give any name he pleases to his house, even though he thus causes inconvenience to a neighbour whose house is called by the same name.[1] But the law will not allow a man to label goods which he sells with any name he pleases, if the result will be to mislead and deceive the public into an erroneous belief as to the quality and manufacture of the goods. The law recognises no property in the name of an ancient family or of a particular mansion, but it does protect the name of a tradesman who has established a reputation for a particular commodity.

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[1] *In re Sandow, Ltd.'s Application* (1914), 31 R. P. C. 196; 30 Times L. R. 394, and see *post*, p. 621.

[2] *Lewis* v. *Vine and Vine's Perfumery Co.* (1913), 31 R. P. C. 12.

[3] *Re Thomas Crook's Trade Mark* (1914), 31 R. P. C. 79; 110 L. T. 474.

[4] *Reddaway* v. *Banham*, [1896] A. C. 199.

[5] S. 11.

[6] *Lever* v. *Goodwin* (1887), 36 Ch. D. 1; *Leather Cloth Co.* v. *Hirschfield* (1865), L. R. 1 Eq. 299.

[7] See however, the Registration of Business Names Act, 1916 (6 & 7 Geo. V. c. 58).

Yet a man cannot, as a rule, be prohibited from using his own name; otherwise to bear a well-known name might become a disability. There is clearly a difference between a case in which a man uses his own name and one in which he purposely assumes a well-known name in order to deceive the public.

And it is not only by the improper assumption or use of a name that a man may pass off his goods as and for the goods of another manufacturer whose name is better known in the trade. He may do so by wrapping up his goods in packages of a certain size or appearance, or by using a particular kind of label or issuing advertisements of a misleading character. "No one has any right to represent his goods as the goods of another,"[2] or to do anything which is calculated to have that effect, even though it was not his intention to create that impression. In all such cases the person whose wares he has consciously or unconsciously imitated may bring an action claiming damages or an injunction.

There are four cases which must be considered separately:—

(i.) Where the defendant trades under his own name.

(ii.) Where the defendant trades under or otherwise uses a name not his own.

(iii.) Where the defendant attaches to his goods the name of a place or thing, or of any character in history or fiction, which is already associated with the goods manufactured by another.

(iv.) Where a man places his own goods in wrappers or affixes to them labels which convey the impression that they are manufactured by another person already well known in the trade.

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[1] *Day* v. *Brownrigg* (1878), 10 Ch. D. 294.

[2] *Per* Lord Halsbury, L. C., in *Reddaway* v. *Banham*, [1896] A. C. at p. 204.

(i.) A man is always *primâ facie* entitled to trade under his own name. It is the natural and obvious thing for him to do. And he may do so, although some relative of his (who bears the same surname) happens to be engaged in the same trade, and the public may mistake his goods for those of his relative. But there may be circumstances in which a man will be prohibited from using even his own name in a particular trade, *e.g.*, where a man who bears the same name as A. has made a great success in a particular trade and A. suddenly abandons his former occupation and starts in that trade with the deliberate intent of acquiring some of the business of his namesake. But without proof of some such dishonest motive the plaintiff cannot obtain an injunction to restrain the defendant from using his own name; still less can he obtain damages.[1]

For fifty years prior to 1851 William Robert Burgess carried on business as an Italian warehouseman at 107, Strand, and there sold a sauce known as "Burgess's Essence of Anchovies," which became famous. His son, William Harding Burgess, was employed there for many years at a salary. Then a difference arose between them, and the son started an Italian warehouse of his own at 36, King William Street, City, painting up over the door his own name, W. H. Burgess. He there manufactured and sold a sauce which he called "Burgess's Essence of Anchovies." His father sought to restrain him from so doing, but the Court refused to do so, as there was no circumstance showing fraud on the part of the son. Knight Bruce, L. J., remarked that "all the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less because their fathers have done so before them. All the Queen's subjects have a right to sell in their own name, and not the less because they bear the same name as their father."[2]

On the other hand, a man "may be restrained if he associates another man with him so that under their joint names he may pass off goods as the goods of another."[3] Thus in 1801 Charles Day and Benjamin Martin entered into partnership as manufacturers of blacking at 97, High Holborn. About 1843 Charles Day's nephew and namesake induced an acquaintance of his of the name of Martin to allow him to use the name of Martin in connection with a new business for the manufacture and sale of blacking, though Martin was never taken into partnership. He set up business at 90½, Holborn Hill. It was held that the nephew Charles Day and his friend Martin must be restrained from trading in blacking under their own names, although the two men who created and owned the trade name "Day & Martin" were both dead and the business was carried on by the executors of the survivor.[1]

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[1] *Sykes* v. *Sykes* (1824), 3 B. & C. 541; *James* v. *James* (1872), L. R. 13 Eq. 421; *Mitchell* v. *Condy* (1877), 37 L. T. 268, 766; *Massam* v. *Thorley's Cattle Food Co.* (1877), 6 Ch. D. 574, and (1880), 14 Ch. D. 763.

[2] *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896; 22 L. J. Ch. at p. 678; and see *Turton* v. *Turton* (1889), 42 Ch. D. 128, and *Brinsmead* v. *Brinsmead* (No. 1) (1913), 30 R. P. C. 137.

[3] *Per* Kay, L.J., in *Powell* v. *Birmingham Vinegar Co.*, [1896] 2 Ch. at p. 80.

(ii.) The plaintiff's task is lighter where the defendant assumes a new name for business purposes, or uses the name of another without his authority, or uses a name closely resembling the name of another already well known in the trade, in a manner calculated to deceive the public. Here the plaintiff will easily obtain an injunction to stop the use of the name in future. He can also obtain damages for the past injury done to his business, if he can establish fraud.[2]

Thus, where a Mr. Singer had acquired a world-wide reputation as a manufacturer of sewing machines to which he gave his own name, it was held by the House of Lords that the defendant (whose name was Wilson) was not entitled to sell sewing machines with the name "Singer" upon them, even though they were stamped with the defendant's own trade mark, and the defendant expressly stated in his advertisement that the machines were manufactured by himself.[3]

Any advertisement, which suggests that the advertiser is a partner in a well-known firm, or that his business is a branch or connected with the business of such a firm, will be restrained if this be not the case. Thus W. H. Burgess in the case cited on the preceding page was restrained from advertising himself as "late of 107, Strand." But a mere puffing advertisement which falls short of such an assertion, even though it were quite untrue, will not be restrained.[4]

(iii.) We proceed to consider cases in which the defendant attaches to his goods the name of a place or thing, or of some character famous in history or fiction, which is already associated with the goods manufactured by another. We have already dealt with cases in which a trader has an undisputed and registered trade mark. Such a mark is his absolute property, and he can at once stop any one else from using it, however innocently. But there are many words which either cannot be[1] or have not been registered as trade marks, and which are yet well understood by the public to be the designation of a particular class of goods made by or for a particular person. For another to affix such a word to his goods or to use it in his advertisements will be a tort, if his so doing is calculated to mislead the trade or the public. If he does so with the deliberate intention of misleading them, he is liable to be restrained by an injunction and also to pay damages. If, however, he had no such intention, he will not be compelled to pay damages, but he will be restrained from using such word or name in future; for he now knows that it is calculated to mislead. The mere fact that the name or words which the defendant has adopted are not false as he uses them, or that the plaintiff will, if he succeeds, have a virtual monopoly in an exclusive designation which is not capable of being registered as a trade mark, will be no excuse.

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[1] *Croft* v. *Day* (1843), 7 Beav. 84.

[2] *Liebig Extract Co.* v. *Hanbury* (1867), 17 L. T. 298; *Pinet et Cie.* v. *Maison Louis Pinet*, [1898] 1 Ch. 179. And now no one may trade under a name not his own without registering the fact: 6 & 7 George V. c, 58, s. 1).

[3] "*Singer*" *Machine Manufacturers* v. *Wilson* (1877), 3 App. Cas. 376. See especially the judgment of Lord Blackburn, *ib.*, 306.

[4] See *Cundey* v. *Lerwill and Pike* (1908), 99 L. T. 273; contrast *Hookham* v. *Pottage* (1872), L. R. 8 Ch. 91; and see *May* v. *May* (1914), 31 R. P. C. 327.

Where a manufacturer (X.) makes an article under a certain name so that it comes to mean in the trade the article made by him and nothing else, no trader is entitled to use that name in connection with his goods in a manner calculated to mislead purchasers into the belief that his goods are X.'s. This is so, although the name is in its primary meaning merely a description of the goods, and therefore might originally have been applied with equal justice to the goods of both manufacturers.[2]

"A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade mark, properly so called, or within recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for

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[1] See *Thompson* v. *Montgomery*, [1891] A. C. 217; and *ante*, p. 425. A person is liable to be sued in one and the same action both for the infringement of a trade mark and in the alternative for passing off his goods as and for those of the plaintiff: *Poulton* v. *Kelly* (1904), 21 R. P. C. 392.

[2] *Reddaway* v. *Banham*, [1896] A. C. 199 ("Camel Hair Belting"), distinguished in *Cellular Clothing Co.* v. *Maxton & Murray*, [1899] A. C. 326, and in *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.*, [1907] 2 Ch. 312; and see *Horlick's Malted Milk Co.* v. *Summerskill* (1916), 115 L. T. 843.

> the plaintiffs' just as much as the use of a trade mark; and I think that both trade marks and trade names are in a certain sense property,[1] and that the right to use them passes with the goodwill of the business to the successors of the firm that originally established them, even though the name of that firm be changed so that they are no longer strictly correct."[2]

Thus, where the defendant discovered that the famous "Glenfield starch" was not made at Glenfield (a tiny place in Scotland), and therefore started to manufacture starch at Glenfield, it was held that he was not at liberty to sell his starch under the name "Glenfield starch," although it was the only starch made at Glenfield. The Court thought that his sudden migration to this small and distant place to start his manufacture was a sign of fraud.[3]

(iv.) We now pass from names and particular words to consider the effect of a general resemblance which a man may create either deliberately or unconsciously between the appearance of his own goods and those of others in the same trade. It is sometimes difficult to avoid a certain resemblance between articles of the same kind and intended for the same purpose. But no man has a "right to put off his goods for sale as the goods of a rival trader, and he cannot therefore be allowed to use names, marks, letters or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."[4] If the label, wrapper, picture, &c., is calculated to lead purchasers to believe that the goods of the defendant are the goods of the plaintiff, an action of tort will lie; and the plaintiff can obtain an injunction and also recover damages, without proof of any actual fraud in the mind of the defendant.

> "It is not necessary, as a rule, to prove that there was any intention to deceive on the part of the defendant. Nor is it necessary to prove that

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[1] See *Hall* v. *Barrows* (1863), 4 De G. J. & S. 150.

[2] *Per* Lord Blackburn in *Singer Manufacturing Co.* v. *Loog* (1882), 8 App. Cas. at pp. 32, 33; and see *Millington* v. *Fox* (1838), 3 My. & Cr. 338.

[3] *Wotherspoon* v. *Currie* (1872), L. R. 5 H. L. 508; and see *Barnard* v. *Bustard* (1863), 1 Hem. & Miller, 447 ("The Excelsior White Soft Soap"); *Kinahan* v. *Bolton* (1863), 15 Irish Chancery Reports, 75 ("L.L. Whiskey"); *Ford* v. *Foster* (1872), L. R. 7 Ch. 611 ("Eureka Shirt"); *Thompson* v. *Montgomery* (1889), 41 Ch. D. 35, affirmed [1891] A. C. 217 ("Stone Ale"); *Powell* v. *Birmingham Vinegar Brewery Co.*, [1896] 2 Ch. 54 ("Yorkshire Relish"); *Burberry's* v. *Cording & Co., Ltd.* (1909), 100 L. T. 985; 26 R. P. C. 693 ("Slip-on").

[4] *Per* Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865), 11 H. L. Cas. at p. 538, cited with approval by Lord Herschell in *Reddaway* v. *Banham*, [1896] A. C. at p. 209.

there was an actual deception, though, of course, proving any individual instance of actual deception will greatly strengthen the plaintiff's case."[1] "Of course, the fact, if proved, that persons of ordinary intelligence have in truth been deceived, would be very material in assisting the Court in coming to the conclusion that the mark or the picture complained of was calculated to deceive; but even the evidence that one person has actually been deceived is not conclusive, as was held by Malins, V.-C., in *Civil Service Supply Association* v. *Dean*,[2] where he said in effect that the witness was really too foolish: *qui vult decipi, decipiatur*."[3]

In these "passing-off" actions, as they are called, the plaintiff must, in the first place, establish that the "get-up" which the defendant has now adopted for his goods is in some essential particulars the "get-up" by which the plaintiff's goods are recognised in the market.[4] Then, as a rule, there is only one substantial issue: Is what the defendant is doing calculated to deceive the trade, or the public, or both? Evidence of those conversant with the particular trade is admissible on this issue.[5] At the same time it must be remembered that this is a question for the Court, and not for the witness, to decide. Hence such evidence is only admissible to aid the judge in forming his own opinion on the question.[6] If the defendant's goods, on the face of them and having regard to surrounding circumstances, are calculated to deceive, evidence to prove the intention to deceive is unnecessary and therefore inadmissible; but if a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then evidence of intention to deceive is admissible, provided such an intention has been clearly alleged in the pleadings.[5] This evidence may be supplied by admissions, oral or in writing, or by inference from conduct.[7]

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[1] *Per* Parker, J., in *Birmingham Small Arms Co.* v. *Webb* (1906), 24 R. P. C. 27. "It is not necessary that proof should be given of persons having been actually deceived": *per* Lord Westbury, L. C., in *Edelsten* v. *Edelsten* (1863), 1 De G. J. & S. at p. 200, cited with approval by Farwell, J., in *Bourne* v. *Swan & Edgar, Ltd.*, [1903] 1 Ch. at p. 227.

[2] (1879), 13 Ch. D. 512; and see the judgment of Lord Watson in *Singer Manufacturing Co.* v. *Loog* (1882), 8 App. Cas. at pp. 39, 40.

[3] *Per* Farwell, J., in *Bourne* v. *Swan & Edgar, Ltd.*, [1903] 1 Ch. at p. 223.

[4] *Hunt. Roope, Teage & Co.* v. *Ehrmann*, [1910] 2 Ch. 198.

[5] *Claudius Ash, Sons & Co., Ltd.* v. *Invicta Manufacturing Co., Ltd.* (1912), 29 R. P. C. 465.

[6] *Birmingham Small Arms Co.* v. *Webb* (1906), 24 R. P. C. 27; *Hennessy* v. *Keating* (1907), 25 R. P. C. 125.

[7] *Saxlehner* v. *Apollinaris Co.*, [1897] 1 Ch. 893.

Let us assume that the defendant has used a label which in its general appearance greatly resembles the plaintiff's label, although a closer examination will disclose many minute differences. The purchaser of the package does not take the two labels and compare them; he never has them both before him at the same time. He sees one label, and from its general appearance concludes that the goods inside the package were manufactured by the plaintiff. He probably would not have arrived at this erroneous conclusion if he had had both labels before him for comparison. And even if the first purchaser is not deceived by the resemblance, purchasers from him may be deceived. Hence persons conversant with the particular trade will be allowed to state whether in their opinion the resemblance between the two labels is so close as to be likely to cause one to be mistaken for the other.[1] But their opinions are not conclusive: the judge must look at both labels and then decide the question for himself.[2]

This action of passing-off was the creation of the Court of Chancery. At common law there was, of course, the action of deceit, by means of which damages could be recovered by any one who was induced to purchase an article which he did not want because it was a colourable imitation of the article which he did want. In such an action, however, the purchaser would have to establish that the defendant had contrived the resemblance in order to deceive the public. He would also have to show damage. Again, such a purchaser, on discovering the deception which had been practised upon him, could rescind the contract, return to the defendant the inferior article which had been foisted upon him and sue the defendant for the price as money received by the defendant to the use of the plaintiff. But these were the remedies of the individual members of the public who had been actually deceived; there was no remedy at common law for the manufacturer or owner of the goods which had been thus colourably imitated. Yet clearly his custom would be to some extent diminished, and the reputation of his goods possibly impaired. On the other hand, in an action for "passing-off," the person whose wares, wrappers or labels are imitated takes up arms nominally to protect the public;

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[1] *Johnston* v. *Orr Ewing & Co.* (1882), 7 App. Cas. 219. And see *North Cheshire, &c., Brewery Co.* v. *Manchester Brewery Co.*, [1899] A. C. 83; *Payton* v. *Snelling* (1900), 17 R. P. C. 628, 635.

[2] But see *London General Omnibus Co., Ltd.* v. *Lavell*, [1901] 1 Ch. 135.

but he really seeks to defend his quasi-proprietary right to a trade name or label, and to defend himself from unfair competition. If he succeeds in such an action, he is entitled to an injunction and also either to damages or, if he prefers, to an account of the profits which the defendant has made by using the deceptive name or label.

CHAPTER XV.

JOINT TORTS AND CIVIL CONSPIRACIES.

JOINT TORTS.

So far we have assumed that the tort on which the action is founded is the act of a single individual. Often, however, injury is caused to the plaintiff by the joint act of two or more persons. These may either act in concert, each taking some part in the proceeding, or one of them may do the wrongful act at the bidding of the others. In either case the wrongful act is a joint tort; and all persons concerned in it are liable jointly and severally for all consequent damage.[1]

It is not necessary that each tortfeasor should be present and personally take part in the actual commission of the wrong. If a master commands his servant to commit a trespass or assault and the servant does so in the absence of his master, both are joint tortfeasors. That his master ordered him to do so will be no defence. "For the warrant of no man, not even of the King himself, can excuse the doing of an illegal act; for although the commanders are trespassers, so are also the persons who did the fact."[2] And if judgment be given against the servant, he cannot recover any contribution from his master; and any previous promise to indemnify him against the consequences of his wrongful act will be void.[3]

A person who is injured by a joint tort has a right of action against each of those who were concerned in its commission. But he is not bound to sue them all; he may, if he prefers, sue only one or two of them, and the liability of the others will be no defence for those sued and will not mitigate the damages recoverable in respect of the joint tort.

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[1] Co. Litt. 232 a; 1 Wms. Saund. 291 f; *Sutton* v. *Clarke* (1815), 6 Taunt. 29; *Greenlands* v. *Wilmshurst, &c.*, [1916] 2 A. C. 15.

[2] *Per cur.* in *Sands* v. *Child and others* (1693), 3 Lev. at p. 352. And see *Mill* v. *Hawker and others* (1875), L. R. 10 Ex. 92; *Att.-Gen.* v. *De Winton*, [1906] 2 Ch. 106; *Cory & Son, Ltd.* v. *Lambton and Hetton Collieries* (1916), 86 L. J. K. B. 401.

[3] *Shackell* v. *Rosier* (1836), 2 Bing. N. C. 634.

But a judgment against these is a bar to any subsequent action for the same tort against any one else who was jointly liable with them, even though the judgment in the first action has not been satisfied.[1] The plaintiff can only bring one action for a joint tort; he cannot recover twice over from different defendants damages for the same injury. So a release given to one or more of the tortfeasors is a release to them all, for "the cause of action is one and indivisible."[2]

Moreover, according to the strict rule of the common law, there is no contribution between tortfeasors;[3] that is to say, if a plaintiff who has recovered damages against two defendants for a joint tort levies the whole damages on one of them, that one has no claim against the other for his share of such damages. Thus a principal, who employed another to commit a tort on his behalf, cannot be compelled to compensate his agent for the damages and costs which he has had to pay the person injured. The proprietor of a newspaper cannot make his editor recoup him the damages and costs recovered by a plaintiff in respect of a libel which the editor carelessly inserted without the knowledge of the proprietor.[4] Moreover, the jury have no right to split up the damages awarded into the shares which in their opinion each defendant ought to pay.[5]

The rigour of the common law has, however, been somewhat modified in recent times. It is now held that where the wrongful act in question is not clearly illegal, but may have been done in good faith, contribution or indemnity can be claimed. Thus, an auctioneer, who in good faith sells goods on behalf of a person who has no right to dispose of them, is entitled to be indemnified by that person against the claim of the rightful owner.[6] A similar distinction exists in the case of an express indemnity. If a person is instructed to do an act which is clearly tortious, and the person so instructing him undertakes to indemnify him from the consequences of such act, no action will lie; yet if the act which he is instructed to do is not of itself manifestly unlawful, and he does not know it to be so, he can recover thereon.[7]

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[1] *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547.

[2] *Per* A. L. Smith, L. J., in *Duck* v. *Mayeu*, [1892] 2 Q. B. at p. 513.

[3] *Merryweather* v. *Nixan* (1799), 1 Sm. L. C., 12th ed., 443; but see *Shepheard* v. *Bray*, [1907] 2 Ch. 571.

[4] *Colburn* v. *Patmore* (1834), 1 Cr. M. & R. 73.

[5] *Damiens* v. *Modern Society, Ltd.* (1910), 27 Times L. R. 164.

[6] *Adamson* v. *Jarvis* (1827), 4 Bing. 66.

[7] See the remarks of Lord Denman, C. J., in *Betts and another* v. *Gibbins* (1834), 2 A. & E. at p. 74; *Burrows* v. *Rhodes and Jameson*, [1899] 1 Q. B. 816.

Another exception to this rule was created by the Directors' Liability Act, 1890,[1] which provides that in case of representations made by directors of companies, whereby they become liable to pay damages under this Act, each director shall be entitled to contribution, as in cases of contract, from any other person who, if sued separately, would have been liable; and this statutory right to contribution applies where the directors are sued and held liable in a common law action of deceit as fully as if they had been sued under this Act.[2]

CIVIL CONSPIRACIES.

Closely resembling an action for a joint tort is an action brought to recover compensation for damage which the plaintiff has sustained from a conspiracy between the defendants. Most conspiracies are crimes; and we have defined a criminal conspiracy as an agreement by two or more persons to carry out an unlawful common purpose or to carry out a lawful common purpose by unlawful means.[3] We have also seen that the phrase "unlawful purpose" in this definition covers all crimes and most torts and a few acts, which are neither torts nor crimes, but are either flagrantly immoral or obviously injurious to the public interest. If in carrying into effect a criminal conspiracy the conspirators inflict loss and damage on a private individual, he will have a private action for the particular damage which he has separately sustained. This is in accordance with the general rule, to which reference has already been made. But in an action brought for damage caused by a conspiracy "the damage sustained by the plaintiff is the ground of the action, and not the conspiracy."[4] And the damage must be either the natural and necessary consequence of the defendants' act, or the defendants must have contemplated or intended that such damage should fall on the plaintiff; otherwise it will be too remote. The crime is complete as soon as the unlawful agreement has been made; but to sustain an action there must be a conspiracy, a wrongful act done in pursuance of it, and special damage resulting therefrom to the plaintiff.

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[1] 53 & 54 Vict. c. 64, s. 5, re-enacted by the Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), s. 84 (4).

[2] *Gerson* v. *Simpson*, [1903] 2 K. B. 197.

[3] *Ante*, p. 255.

[4] *Skinner* v. *Gunton* (1669), 1 Wms. Saund. 229 b, n. 4; Buller's Nisi Prius, 14; *Barber* v. *Lesiter* (1859), 7 C. B. N. S. 175, 186; *Thomas* v. *Moore*, [1918] 1 K. B. 555; and cf. private rights arising out of public nuisance, *ante*, p. 500.

"An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie."[1] "I then eliminate the conspiracy as a part of the substantial cause of action and use it for the purposes for which only in such an action it is available: viz., (i.) as making the defendants jointly responsible for the acts done in pursuance of it; and (ii.) as indicating the alleged malicious or wrongful intention which governed those acts."[2]

The defendant and S. conspired to obtain possession of a portion of the plaintiff's premises and to set up illicit stills there, and in pursuance of this conspiracy, by falsely pretending to the plaintiff that S. wanted the premises for carrying on a lawful trade, persuaded the plaintiff to demise them to S. and to allow him and the defendant to take possession. The defendant and S. took possession, and set up illicit stills and manufactured spirits on the premises. An Excise officer found the stills upon the demised premises, and at the same time discovered the plaintiff there, who appeared to be aiding in the illicit distilling; whereupon the officer arrested the plaintiff and took him before a magistrate. The plaintiff was unable to prove his innocence and was convicted, thus sustaining special damage. It was held that no action lay, because the damage to the plaintiff was not shown to have been either intended by the defendant or to have been the necessary result of his acts.[3]

In the course of the argument in the above case Williams, J., asked the question: "A. and B., having committed a felony by stealing, put the stolen goods in C.'s box, and the result is that C. is convicted of the felony. Would an action for a conspiracy lie at the suit of C. against A. and B.?" And counsel replied: "It is submitted that it would not, unless the conspiracy was to convict C. by perjury and false evidence."[4]

A breach of contract by one of the contracting parties is no tort and, as a rule, no crime. But for a stranger to the contract, without just cause or excuse, knowingly to induce one of the contracting parties to break his contract is—except in the case of a trade dispute[5]—a tort. And for several persons to combine in so inducing a breach of contract is a criminal conspiracy. Hence the other party to the contract can bring an action against all or any of the conspirators, if he has sustained a particular loss through their conduct.[1]

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[1] *Per* Lord Holt, C. J., in *Savile* v. *Roberts* (1699), 1 Lord Raym. at p. 378.
[2] *Per* Palles, C. B., in *Kearney* v. *Lloyd* (1890), 26 L. R. Ir. at p. 279.
[3] *Barber* v. *Lesiter* (1859), 7 C. B. N. S. 175.
[4] 7 C. B. N. S. at p. 182; 29 L. J. C. P. at p. 164.
[5] See as to criminal cases, *ante*, p. 260; as to civil actions, *post*, p. 632.

"It is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference."[2] This is so, whether the interference complained of be the act of one man or of many. But "it is not every procuring of a breach of contract that will give a right of action."[3] The defendants must have known of the terms of the contract of which they were procuring the breach, or at least of its existence; their interference must have been without sufficient justification, and damage must have ensued to the plaintiff.

The plaintiffs, who were manufacturers, sold their goods wholesale to factors upon the terms *inter alia* that the factors should not sell them to retailers at less than a specified price, and not at all to certain dealers who were on a "suspended" list. The defendants, who were dealers on this list and who were well aware of the terms of the agreement between the plaintiffs and their factors, employed H. and L. to obtain the plaintiffs' goods from certain factors, who had signed the plaintiffs' factors' agreement, by falsely representing themselves as independent dealers and by dealing in fictitious names. By this means they procured the plaintiffs' goods and paid for them through H. and L. at a price less than that specified in the agreements, thereby causing the plaintiffs damage. It was held by the Court of Appeal that this was an unjustifiable interference with the contractual rights between the plaintiffs and the factors.[4]

Again, no one is bound to work for or deal with a particular person; he may lawfully refuse to enter into any contract with him. But if a large number of persons agree together that they will not enter into any contracts with some unpopular person—will not supply him or his family with the necessaries of life—such boycotting is in many cases a crime;[1] and if the person boycotted sustains any pecuniary loss in consequence of such a criminal conspiracy, he has a good cause of action for damages, although the combination in itself and without such consequent damage is no tort.[2]

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[1] *Skinner* v. *Kitch* (1867), L. R. 2 Q. B. 393; *Quinn* v. *Leathem*, [1901] A. C. 495; *Read* v. *Friendly Society of Operative Stonemasons and others*, [1902] 2 K. B. 732; *Giblan* v. *National Amalgamated Labourers' Union, &c.*, [1903] 2 K. B. 600; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; *Sweeney* v. *Coote*, [1906] 1 I. R. 57; [1907] A. C. 221; *National Phonograph Co., Ltd.* v. *Edison Bell, &c., Co., Ltd.*, [1908] 1 Ch. 335.

[2] *Per* Lord Macnaghten in *Quinn* v. *Leathem*, [1901] A. C. at p. 510.

[3] *Per* Rigby, L. J., in *Exchange Telegraph Co.* v. *Gregory & Co.*, [1898] 1 Q. B. at p. 157, quoted with approval by Kennedy, L. J., in *National Phonograph Co., Ltd.* v. *Edison Bell, &c., Co., Ltd.*, [1908] 1 Ch. at p. 367.

[4] *National Phonograph Co., Ltd.* v. *Edison Bell, &c., Co., Ltd.*, [1908] 1 Ch. 335.

It was, before the passing of the Trade Disputes Act, 1906,[3] held actionable for the committee and officers of a trade union to publish a "black list," with the object of forbidding all members of the union to have any business with any of the persons or firms named in the list. Kekewich, J., granted an injunction to restrain any further circulation of such a "black list," on the ground that its publication was a purely malicious act, unnecessary for the protection of the defendants or the men whom they represented, and intended to injure the plaintiffs and the men who still remained in their employ. The Court of Appeal, with some hesitation, affirmed this decision.[4] "Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost."[5]

But it is not every conspiracy to commit a tort which is criminal. Thus in *R.* v. *Turner and others*[6] it was held that a conspiracy to commit merely a civil trespass was not indictable. Nevertheless, as the eight defendants had undoubtedly committed torts together and in committing them had done damage, they were each and all of them liable in a civil action as joint tortfeasors.[7] In such an action it would not be necessary to have recourse to any law of conspiracy.

There is, however, authority for saying that there exists a third class wholly apart from both criminal conspiracies and joint torts, which is perhaps best described by the name of civil conspiracies. The boundary lines which distinguish such a conspiracy from an indictable conspiracy are vague and nebulous. The limits indeed of the class of indictable conspiracies are by no means clear. But there are, it seems, conspiracies which may be the foundation of an action, though not of an indictment; and there are undoubtedly cases in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although, if one of them did the same act by himself and without any preconcert with others, he would escape liability, both civil and criminal.

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[1] See *ante*, pp. 264, 265.

[2] *Temperton* v. *Russell and others*, [1893] 1 Q. B. 715; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244.

[3] 6 Edw. VII., c. 47.

[4] *Trollope & Sons* v. *London Building Trades Federation* (1895), 11 Times L. R. 228, 280; (1896), 12 Times L. R. 373. And see *Collard* v. *Marshall*, [1892] 1 Ch. 571; *Newton* v. *Amalgamated Musicians' Union* (1896), 12 Times L. R. 623; *Leathem* v. *Craig and others*, [1899] 2 I. R. 667.

[5] *Per* Lord Lindley in *Quinn* v. *Leathem*, [1901] A. C. at p. 538.

[6] (1811), 13 East, 228.

[7] See *Walters* v. *Green*, [1899] 2 Ch. 696.

Any party to a contract is always at liberty to put an end to the contract by giving proper notice or adopting any other agreed method of determining it. His motives for wishing to do so are immaterial. And it is no tort for any one to persuade him to do that which he has a perfect right to do. But the case is different where many persons combine to do all in their power to persuade the workmen at a certain factory simultaneously to give notice that they will stop work at the earliest legal opportunity. Very few workmen are engaged for more than a week at a time; many only work by the day or the hour. Hence a widespread combination might close the works on very short notice without any breach of contract being committed. If this were done without any just occasion or excuse, it is submitted that the employer would have a good cause of action against those who form the combination to recover any special loss which he may have sustained;[1] and this although the combination in itself is neither a tort nor a crime.[2]

It is no tort—still less is it a crime—for one man to bring a vexatious civil action against another in his own name, even though this be done maliciously and without reasonable or probable cause. But if a man who is solvent agrees with a man whom he knows to be insolvent that they will harass a third person by bringing a vexatious action against him in the name of the insolvent man, this is a conspiracy in respect of which an action on the case will lie, provided the plaintiff has thereby sustained some special damage, other than the payment of "extra costs." The fact that the plaintiff was thus compelled to pay "extra costs" to his own solicitor is insufficient, as such costs are not legal damage.[3]

"The act of hissing in a public theatre is *primâ facie* a lawful act."[4] "There is no doubt that the public who go to a theatre have a right to express their free and unbiassed opinions of the merits of the performers who appear on the stage. . . . At the same time parties have no right to go to a theatre by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme, probably concocted for an unworthy purpose."[5] Hence where a declaration alleged that the plaintiff was an actor and was engaged to perform the character of Hamlet in Covent Garden Theatre, and the defendants and others maliciously conspired together to prevent him from so performing, and in pursuance of the conspiracy hired and procured persons to go to the theatre and hoot the plaintiff, and they did so and interrupted his performance, and thereby caused the plaintiff to lose his engagement, and to be brought into public scandal and disgrace, it was held that the pleading disclosed a good cause of action. But at the trial of the action the plaintiff failed to satisfy the jury of the existence of the alleged conspiracy; there was no other evidence of malice in the defendants; and the jury therefore found a verdict against the plaintiff.[1]

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[1] See *ante*, pp. 263, 264.

[2] *Jose* v. *Metallic Roofing Co. of Canada, Ltd.*, [1908] A. C. 514; and see *ante*, p. 262.

[3] *Cotterell* v. *Jones* (1851), 11 C. B. 715; *Coondoo* v. *Mookerjee* (1876), 2 App. Cas. 186; and see *ante*, p. 552.

[4] *Per cur.* in *Gregory* v. *Duke of Brunswick and another* (1844), 6 M. & G. at p. 959.

[5] *Per* Tindal, C. J., *Ib.* (1843), 1 C. & K. at pp. 31, 32.

This case is generally cited as an authority for the proposition that though an act may in itself be lawful, nevertheless, if several persons agree together beforehand to do that act from malicious motives and without any just occasion, they will be liable to a civil action for conspiracy should damage result to the plaintiff. But it must not be overlooked that the defendants in this case did not seek to justify their hooting as a fair comment on any performance of the plaintiff; they claimed a right to hiss him off the stage as soon as he made his appearance because of his private life, alleging that he was a general libeller, blackmailer, &c. The Court nowhere decided that to hiss an actor thus prematurely and for such a reason as this was a lawful act. Indeed, the remarks cited above from the summing up of Tindal, C. J., directly suggest the contrary. Moreover, in *Clifford* v. *Brandon*[2] Sir J. Mansfield, C. J., stated explicitly that "the audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment."

But the area of this class of cases was greatly diminished by the decision of the Court of Appeal in 1889 (subsequently affirmed by the House of Lords) in the case of *Mogul Steamship Co., Ltd.* v. *McGregor*.[3] Their Lordships decided that a combination made by two or more persons with the object of protecting and extending their trade and increasing their profits, and not for the purpose of injuring the plaintiff, is not a conspiracy on which any action for damages can be based, so long as they had employed no means in themselves unlawful—and this although the plaintiff had in fact suffered serious damage as a result of the combination.

A more determined blow was struck at the existence of this whole class of actions by Darling, J., in the case of *Huttley* v. *Simmons and others*,[1] in which he laid down that a conspiracy to do certain acts, which are not in themselves criminally punishable, gives a right of action only where the acts agreed to be done and in fact done would, had they been done without preconcert, have involved a civil injury to the plaintiff, for which he would have had a right of action. His Lordship relied on the elaborate judgment given by Palles, C. B., in the Irish case of *Kearney* v. *Lloyd and others*,[2] in which that learned judge laid down the law in very similar terms. But the decision in *Huttley* v. *Simmons* has met with adverse comment. In *Quinn* v. *Leathem*,[3] Lord Lindley said: "In *Huttley* v. *Simmons* the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union, who were alleged to have maliciously induced the cab-owner not to employ the plaintiff and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated." Lord Brampton, in the same case, after remarking[4] that "the essential elements, whether of a criminal or of an actionable conspiracy, are in my opinion the same, though to sustain an action special damage must be proved," dwelt upon the important distinction between the unlawfulness of the object of the conspiracy and the unlawfulness of the acts by which it is carried into effect. He appears to have held that, if the object of the conspiracy as proved is not unlawful, an action for the conspiracy cannot be maintained; but that, if the object of the conspiracy is unlawful, it is immaterial whether the overt acts, by which it is carried into effect, are unlawful or not. But he differed from the view expressed by Darling, J., in *Huttley* v. *Simmons* that overt acts done in pursuance of a combination of persons are not unlawful whenever they would not have been so if done by one individual without any preconcert. "Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming."[1]

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[1] *Gregory* v. *Duke of Brunswick* (1843), 1 C. & K. 24; 6 M. & G. 205, 953.
[2] (1809), 2 Camp. at p. 369.
[3] 23 Q. B. D. 598; [1892] A. C. 25.

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[1] [1898] 1 Q. B. 181.

[2] (1890). L. R. Ir. 268, approved in *Sweeney* v. *Coote*, [1906] 1 Ir. R. 51; [1907] A. C. 221.

[3] [1901] A. C. at p. 540.

[4] *Ib.*, at pp. 528, 529.

But this point of law, though theoretically interesting, is no longer of so much practical importance, for it generally arises in connection with a trade dispute, and by the Trade Disputes Act, 1906,[2] it is enacted that:—

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."[3]

"It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."[4]

"An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."[5]

"An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court." [1] And this prohibition applies whether the alleged tortious acts were committed in contemplation or furtherance of a trade dispute or not. [2] "Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871,[3] section 9, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute." [4]

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[1] *Per* Lord Brampton in *Quinn* v. *Leathem*, [1901] A. C. at p. 530; and see the remarks of Romer, L. J., in *Giblan* v. *National Labourers' Union*, [1903] 2 K. B. at p. 619.

[2] 6 Edw. VII. c. 47.

[3] S. 1.

[4] S. 2, sub-s. (1). Prior to the passing of this Act it was held that to watch or beset a man's house without reasonable justification, with a view to compel him to do or not to do that which it was lawful for him not to do or to do, was a wrongful act, a nuisance at common law; for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset. Peaceable persuasion was only permitted where the method employed was no nuisance: *Lyons* v. *Wilkins*, [1899] 1 Ch. 255. And see *McCusker* v. *Smith*, [1918] 2 Ir. R. 432.

[5] S. 3.

A trade dispute is defined in the Act as "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person." [5]

The meaning of the phrase "trade dispute" was much discussed both in the Court of Appeal and in the House of Lords in the case of *Conway* v. *Wade*.[6] In that case the plaintiff, a member of a trade union, was fined 10*s*. for a breach of the union rules in 1900; this fine was not paid. In 1907 the plaintiff joined another branch of the union, and was in employment with other union men as a boiler scaler. The defendant, who was the district delegate of the union, at the instigation of some of the plaintiff's fellow-workmen who knew of the unpaid fine and of the treasurer of the branch of the union which had imposed it, went to the foreman of the plaintiff's employers and told him that, if the plaintiff were not "stopped," there would be trouble with the men. The defendant had no authority from the executive of the union to do this. As a result of the defendant's interference the plaintiff was dismissed from his employment. He brought an action against the defendant in the county court and recovered £50 damages. The jury found that at the time of the defendant's interference there was no trade dispute existing or contemplated and that the defendant's threats were uttered in order to compel the plaintiff to pay a union fine, to punish him for not paying it and to prevent him from getting or retaining employment. These findings were upheld by the House of Lords.

When this case was before the Court of Appeal, Kennedy, L. J., expressed the opinion that it was clear from the language of section 5 (3) that the Act applied "not only in the case of a trade dispute between employer and workmen, but also in the case of a dispute between workmen and workmen, where no dispute with the employer has arisen." [7] But a dispute between two firms of employers is apparently not a trade dispute within the meaning of the Act.

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[1] S. 4, sub-s. (1).

[2] *Vacher & Sons, Ltd.* v. *London Society of Compositors*, [1913] A. C. 107.

[3] 34 & 35 Vict. c. 31.

[4] 6 Edw. VII. c. 47, s. 4, sub-s. (2).

[5] S. 5, sub-s. (3).

[6] [1908] 2 K. B. 844; [1909] A. C. 506; and see *Dallimore* v. *Williams & Jesson* (1913), 30 Times L. R. 432; *Valentine* v. *Hyde*, [1919] 2 Ch. 129.

[7] [1908] 2 K. B. at p. 859.

Chapter XVI.

TORTS ARISING OUT OF CONTRACTS.

A tort has been defined as "a wrong independent of contract."[1] And there are no quasi-torts in English law.[2] Yet every breach by A. of a duty which he owes to B. is a tort if it causes B. damage. And such a duty may arise out of a contract into which A. has entered, either with B. or with some one else; and then A.'s breach or neglect of that private duty will be a tort, although it is not wholly independent of contract. For the sake of distinction torts which are wholly independent of contract are often called pure torts.

As a general rule, where a contract exists, an action for any breach of it must be based on the contract, and will not be ground for an action of tort. Yet there are cases in which a person, who is no party to a contract, may bring an action of tort and recover damages for any fraud which induced the contract or for the negligent performance of it, provided it was entered into with express reference to himself. Again, the fact that there is a contract existing between the parties will not prevent the plaintiff from suing in tort, if the circumstances be such that he can do so without relying on the contract. But if, in order to establish any case at all against the defendant, it is necessary for him to prove that he made a contract with the defendant and that the defendant has broken that contract, then he must sue in contract and not in tort. For it is the contract that defines the liability of the defendant.[3]

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[1] Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), Sched. B.

[2] There was really no such thing as a quasi-delict in Roman law. The so-called quasi-delicts were as truly delicts as *furtum* and *rapina*, but they only came to light after the official list of delicts had been closed. The distinction was purely historical.

[3] For illustrations of these principles, see *ante*, pp. 429—431.

BAILMENTS.

Actions of tort frequently arise in connection with bailments and bailments, as a rule, are the result of contracts. Whenever the owner of goods voluntarily hands over possession of them to another person, not his servant, upon a trust or under a contract that the other shall do something with or to the goods, and then return them to the owner or deliver them to his order, the transaction is called a bailment. In every bailment there must be a delivery of goods to the bailee, trust and confidence reposed by the bailor in the bailee, and a corresponding duty on the bailee to execute the trust in the manner prescribed and with due care and diligence. The goods remain the property of the bailor. But the bailee has the possession of them; and this carries with it the right to recover possession of them from any wrongdoer who dispossesses him of them during the continuance of the bailment.[1] It is the duty of the bailee with due diligence to execute the trust or perform the contract, the consideration for which is the delivery of the goods to him.[2] The degree of care, which the law exacts from him, will vary with many circumstances; if, for instance, he is paid for his services, he must take greater care than if he be a gratuitous bailee. And when the bailment is over, it is the duty of the bailee to return the chattel bailed uninjured to the bailor, or to deliver it undamaged at the destination named by him.[3]

It will be no valid excuse for a refusal by the bailee to deliver the goods, that some third person asserts that they were not the property of the bailor at the time of the bailment. But the bailee may set up that the title of the bailor has determined during the bailment, *e.g.*, if, while it was in the possession of the bailee, the bailor sold it to a third person who now claims it.[4]

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[1] *The Winkfield*, [1902] P. 42.

[2] *Coggs* v. *Bernard* (1703), 2 Lord Raym. 900; 1 Smith's L. C., 12th ed., 191.

[3] See *Shaw & Co.* v. *Symmonds & Sons, Ltd.*, [1917] 1 K. B. 799. The bailee may have a lien on the chattel for his charges: *U. S. Steel Products Co.* v. *G. W. Ry. Co.*, [1916] 1 A. C. 189; *Green* v. *All Motors, Ltd.*, [1917] 1 K. B. 625.

[4] *Rogers* v. *Lambert*, [1891] 1 Q. B. 318.

If a tortious act be done by a third person to goods whilst they are under bailment and therefore out of the possession of their owner, an action will in most cases be maintainable either by the bailor or by the bailee. Thus a carrier may maintain an action against a stranger who takes the goods out of his possession; and so may a factor, a warehouse-keeper or an auctioneer;[1] and a trustee, pawnee, licensee or gratuitous bailee may sue for a tort to the chattel held in trust or on bailment and, in any such case, the owner of the goods may under certain circumstances also sue. The distinction is this: where the bailor has entirely parted with his possession of the goods, the bailee is the only person who can bring an action the object of which is to vindicate the right of possession, and the bailor will only be able to sue in cases where his reversionary rights are impaired or endangered.[2] But a mere gratuitous permission to a third person to use a chattel does not, in legal contemplation, take it out of the possession of the owner. Hence for an injury done to the chattel while so used, either the owner or the gratuitous bailee may maintain an action. And where there is an injury to the reversion—as in the case of a horse let on hire to A., which B. takes and kills by violent driving—an action for the trespass lies against B. at the suit of A., the party in possession, and the owner also has an action for the injury to his reversion. But to entitle the reversioner to sue for an injury to a chattel, such injury must be permanent in its nature.

An action will not in general lie at the suit of the owner for the recovery of chattels which have been let on hire or demised for an unexpired term. There are, however, cases which show that where the bailment is determined by the tortious act of the bailee—as by his selling goods entrusted to him for delivery to a third person—the property in them reverts at once to the bailor, who will then be entitled to recover the goods or their value, even from a *bonâ fide* purchaser,[3] unless they were bought in market overt.

Bailments are usually classified under the three following heads:—

(i.) Bailments exclusively for the benefit of the bailor.
(ii.) Bailments exclusively for the benefit of the bailee.
(iii.) Bailments for the benefit of both parties.

(i.) Under the first head come gratuitous contracts of deposit and carriage, *e.g.*, where the bailor deposits goods with the bailee to be kept by him without reward and returned to the bailor when he shall require them, or where a friend undertakes gratuitously to carry goods from one place to another, or to do something to them for the benefit of the bailor. In such cases the bailee is bound to use merely a slight degree of diligence with regard to the thing bailed, and is liable for gross negligence only. The fact that he is to receive nothing for his services would entitle the bailee to refuse to undertake the trust.[1] If, however, he accepts the bailment, he will thereby render himself liable to the extent above indicated for negligence in its discharge, although his services are rendered gratuitously; for the confidence displayed by the bailor in handing over the chattel to the bailee is a sufficient legal consideration to create a duty in the bailee. It is generally true with respect to gratuitous contracts that for nonfeasance, even when a party suffers damage thereby, no action lies, but for misfeasance an action will lie.

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[1] *Williams* v. *Millington* (1788), 1 H. Bl. 81, 84; *Robinson* v. *Rutter* (1855), 24 L. J. Q. B. 250.

[2] *Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299.

[3] *Bryant* v. *Wardell* (1848), 2 Exch. 479, 482; *Chinery* v. *Viall* (1860), 5 H. & N. 288, 293.

This was decided in the case of *Coggs* v. *Bernard*.[2] There the plaintiff alleged that, whereas the defendant undertook and promised safely and securely to take up certain hogsheads of brandy out of a cellar where they were deposited and to lay them down in another place, he so negligently and carelessly put them down again, that by his negligence one of the casks was staved and a quantity of brandy spilt. After verdict an objection was taken that the plaintiff had nowhere alleged that the defendant was a common carrier (in which case, as we shall presently see, peculiar responsibilities would have been cast on him), or that he was to have received anything for his services; and the question consequently was, whether a man, not being a common carrier, who undertakes gratuitously to carry goods or to perform some act in connection with them, is liable for any degree of negligence in the performance of his undertaking: and the Court decided that he was. It was in this case that Lord Holt delivered his celebrated judgment, in the course of which he minutely considered the various classes of bailments and the degree of diligence required in each.

It is not always easy to determine what is gross negligence. It is often a question of mixed law and fact.[3] But in every case good faith requires that the bailee should take reasonable care of the goods entrusted to him; and what is reasonable care must materially depend upon the nature, value and quality of the goods, the circumstances under which they are deposited, and sometimes upon the character and competence and particular dealings of the parties. Even a gratuitous bailee is bound to use whatever skill he possesses with reference to the specific subject-matter of the bailment; for instance, a person conversant with horses might be answerable for damage happening to a horse whilst under his gratuitous care or management, for which an individual not so skilled might be irresponsible.[1]

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[1] Thus no duty is cast upon the recipient of goods voluntarily sent to him without any request on his part: *Howard* v. *Harris* (1884), 1 C. & E. 253.

[2] (1703), 2 Lord Raym. 909; 1 Smith's L. C., 12th ed., 191.

[3] *Per* Taunton, J., in *Doorman* v. *Jenkins* (1834), 2 A. & E. at p. 260.

(ii.) Bailments for the exclusive benefit of the bailee are usually in the nature of loans and, except in the case of a loan of money, the thing bailed must be itself restored to the bailor. The degree of diligence here required from the bailee is very much, if not precisely, that required from a gratuitous bailee, who possesses skill and is therefore bound to exercise it. A person, who borrows anything for use gratuitously, must be taken to have represented himself to the bailor as a person of competent skill. He "is bound to the strictest care and diligence to keep the goods lent so as to restore them back again to the lender."[2]

(iii.) But most bailments are for the benefit of both parties —such as the pledge, hire or carriage of a chattel, or the deposit of it for reward. The general rule in such cases is that ordinary diligence on the part of the bailee is required, and he will therefore be responsible for ordinary neglect.[3] This is so, whenever the chattel is hired for use by the bailee and the bailor receives payment or other consideration for its use. So where goods are deposited for reward with a bailee, he undertakes to use proper care that they shall be safely preserved from loss or injury.[4] This much is implied by law from the bailment, unless it is otherwise expressly agreed between the parties.[3] Where the agreement between them is in writing the liability of the bailee must, of course, be determined by reference to the agreement itself. This may be so, although one of the parties to the bailment may not have read the agreement; if he receives and keeps it, he may be held to have assented to the conditions contained in it, although he did not know what they were.[1] On common carriers and innkeepers the common law imposed a wider liability than on other bailees; but this, as we shall see, has been greatly restricted by statute.

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[1] *Wilson* v. *Brett* (1843), 11 M. & W. 113.

[2] *Per* Lord Holt, C. J., in *Coggs* v. *Bernard* (1703), 1 Smith's L. C., 12th ed., at p. 200; and see the judgment of Lord Campbell, C. J., in *Dansey* v. *Richardson* (1854), 3 E. & B. at p. 167.

[3] See, for instance, *Scaife* v. *Farrant* (1875), L. R. 10 Ex. 358; *Travers & Sons, Ltd.* v. *Cooper*, [1915] 1 K. B. 73; *Coldman* v. *Hill*, [1919] 1 K. B. 443.

[4] As to the liability of a livery stable-keeper, who for reward receives a carriage into his care and lodges it in his coach-house, see *Searle* v. *Laverick* (1874), L. R. 9 Q. B. 122.

A pledge or pawn is a bailment of goods to a creditor, as security for some debt or engagement. "To constitute a valid pledge, there must be a delivery of the article either actual or constructive to the pawnee."[2] The pawnee is bound to use ordinary diligence in the care and safeguard of the thing pawned.

> "If the pawn be such as it will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose were pawned to a lady, she might use them, but then she might do it at her peril; for whereas if she keeps them locked up in her cabinet, if her cabinet should be broken open and the jewels taken from thence, she would be excused; if she wears them abroad and is there robbed of them, she will be answerable; and the reason is because the pawn is in the nature of a deposit and as such is not liable to be used. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner or milk the cow, &c., in recompense for the meat."[3]

The pawnee is bound to give up to the owner the thing pawned upon a tender of the amount due to him; unless indeed it has been lost through no fault of his, in which case he may still claim from the pawnor the amount of the debt secured by the pawn.[4] If, however, the chattel be lost after the pawnor has tendered the amount due, the pawnee will be liable, for he ought not to have detained the pawn after such tender was made. The pawnor retains all his property in the thing pawned and may sell it subject to the rights of the pawnee, which will bind the purchaser. But at common law the pawnee had no right to sell the thing pawned without the consent of the pawnor; he had merely the right to hold it as security for repayment of the sum advanced. Such a right has, however, been given to professional pawnbrokers by statute.

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[1] See the remarks of Mellish, L. J., in *Parker* v. *S. E. Ry. Co.* (1877), 2 C. P. D. at p. 421; and *Harris* v. *G. W. Ry. Co.* (1876), 1 Q. B. D. 515, 529, 530; *Burke* v. *S. E. Ry. Co.* (1879), 5 C. P. D. 1; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

[2] *Per* Erle, C. J., in *Martin* v. *Reid* (1862), 11 C. B. N. S. at p. 734.

[3] *Per* Lord Holt, C. J., in *Coggs* v. *Bernard* (1703), 1 Smith's L. C., 12th ed., at pp. 201, 202.

[4] Bac. Abr. "Bailment," B. As to the liability of a pawnbroker for damage done to goods pawned by an accidental fire, see *Syred* v. *Carruthers* (1858), E. B. & E. 469. Should however the bailee, having contracted to warehouse goods at a particular place, warehouse them elsewhere, where they are destroyed, though without any negligence on his part, he will be liable for the loss so caused: *Lilley* v. *Doubleday* (1881), 7 Q. B. D. 510; and see *Shaw & Co.* v. *Symmons & Sons*, [1917] 1 K. B. 799.

The right of the pawnbroker to sell and of the pawnor to redeem a pledge is now regulated by the Pawnbrokers Act, 1872,[1] which consolidated and amended the former statutes. This Act provides that if the pledge be not redeemed at the expiration of a year and a day, the pawnbroker may then, subject to certain provisions, expose it for sale; but if at any time before the sale has actually taken place the owner of the chattel pawned tender the principal and interest due together with the expenses (if any) incurred, he is entitled to the return of the chattel; for the power of sale is allowed the pawnbroker merely to secure to him the money which he has advanced together with interest.

When a pawnbroker sells a forfeited pledge as such, he sells merely the right to the pledge which he himself had.[2] He only undertakes that the subject of sale was a pledge, that it is now irredeemable and that he is not cognisant of any defect in the title to it. In the absence of fraud and of any usage of the trade to the contrary, he will not be deemed to warrant the title of the chattel sold. Hence a pawnbroker, who has sold a forfeited pledge, will not be liable to refund the purchase-money, if the person who bought it from him is compelled to restore the chattel to its rightful owner.[3]

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[1] 35 & 36 Vict. c. 93, ss. 16—19. This Act does not apply to any loan by a pawnbroker above £10.

[2] See *Chapman* v. *Speller* (1850), 14 Q. B. 621; *Bagueley* v. *Hawley* (1867), L. R. 2 C. P. 625.

[3] *Morley* v. *Attenborough* (1849), 3 Exch. 500. In *Sims* v. *Marryat* (1851), 17 Q. B. at p. 291, Lord Campbell, C. J., after citing with approval the judgment of Parke, B., in *Morley* v. *Attenborough, suprà,* remarks: "It may be that the learned Baron is correct in saying that, on a sale of personal property, the maxim *caveat emptor* does by the law of England apply; but if so, there are many

INNKEEPERS, &c.

The common law held an innkeeper responsible for the safety of the property of his guest, whether money or goods. He has a right to make such charges as will compensate him for the responsibility thus imposed on him, and he has a lien on such property for such charges.[2] "By the custom of the realm innkeepers are obliged to keep the goods and chattels of their guests who are within their inns without subtraction or loss day and night, so that no damage in any manner shall thereby come to their guests from the negligence of the innkeeper or his servants."[3] "An innkeeper is *primâ facie* liable for any loss not occasioned by the act of God or the King's enemies, although he may be exonerated where the guest chooses to have his goods under his own care."[4] But this liability only attaches to the keeper of a "common inn"—*i.e.*, of a house where the traveller is furnished with everything for which he has occasion whilst upon his way—and in respect only of such goods as are received by him in that character; if not so received, he is liable only as an ordinary bailee.

The liability of an innkeeper at common law has been materially diminished by the Innkeepers Act, 1863,[5] which applies to every "hotel, inn, tavern, public-house or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests." Section 1 enacts that no innkeeper shall be liable to a greater amount than the sum of £30 for the loss of or injury to any goods or property brought to his inn by a guest—not including a horse or other live animal or its gear, &c., or any carriage—except (i.) where the goods or property shall have been stolen, lost or injured

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exceptions stated in the judgment which will well nigh eat up the rule. Executory contracts are said to be excepted, so are sales in retail shops or where there is a usage of trade; so that there may be difficulty in finding cases to which the rule would practically apply."

[1] *Kent* v. *Shuckard* (1831), 2 B. & Ad. 803. As to an innkeeper's responsibility for the safety of his premises, see *Maclenan* v. *Segar*, [1917] 2 K. B. 325.

[2] See 41 & 42 Vict. c. 38, s. 1; and *Angus* v. *McLachlan* (1883), 23 Ch. D. 330; *Gordon* v. *Silber* (1890), 25 Q. B. D. 491; *Robins* v. *Gray*, [1895] 2 Q. B. 78, 501.

[3] *Per cur.* in *Calye's Case* (1587), 8 Rep. 32 a; 1 Smith, L. C., 12th ed., 131; and see *Strauss* v. *County Hotel Co.* (1883), 12 Q. B. D. 27.

[4] *Per* Bayley, J., in *Richmond* v. *Smith* (1828), 8 B. & C. at p. 11; and see *Oppenheim* v. *White Lion Hotel Co.* (1871), L. R. 6 C. P. 515; *Herbert* v. *Markwell* (1881), 45 L. T. 649.

[5] 26 & 27 Vict. c. 41.

through the wilful act, default or neglect of the innkeeper or of any servant in his employ; or (ii.) where the goods or property shall have been deposited expressly for safe custody with the innkeeper; but in such a case he is entitled, if he thinks fit, to require that the goods or property shall be deposited in a box or other receptacle fastened and sealed by the person depositing the same. A copy of this section must be exhibited in a conspicuous part of the hall or entrance to the inn. If it is not so exhibited, the innkeeper cannot claim the limitation of his liability granted by the Act in respect of any goods brought into the inn during the time the copy was not so exhibited.[1] "If any innkeeper shall refuse to receive for safe custody as before mentioned any goods or property of his guest, or if such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid," the innkeeper shall not be entitled to the benefit of the Act in respect thereof.[2]

In *Medawar* v. *Grand Hotel Co.*[3] jewels belonging to the plaintiff were stolen. It was impossible to prove whether the same were stolen when the plaintiff's luggage was in a bedroom or in a corridor into which a servant of the hotel removed it. If the former were the case, the plaintiff's negligence could have been shown to have been the cause of his loss; if the latter, the neglect of the innkeeper would have entitled the plaintiff to recover the value of the jewels, although it exceeded £30. As the *onus* of proving negligence lies upon the party who asserts it, and as the plaintiff could not prove negligence in the innkeeper, he recovered only £30.

The liability of the keeper of a boarding-house is less than that of an innkeeper; but he is bound to take as much care of the goods of his boarders as an ordinary prudent housekeeper would take of his own. How far he is answerable for the negligence of his servant is not clear.[4] A lodging-house keeper is responsible for the loss of his lodger's goods when it arises from some wrongful act of his own; but beyond that the law imposes no obligation upon him to take care of the goods of his lodger.[5]

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[1] *Ib.*, s. 3; and see *Spice* v. *Bacon* (1877), 2 Ex. D. 463.

[2] *Ib.*, s. 2.

[3] [1891] 2 Q. B. 11.

[4] See *Dansey* v. *Richardson* (1854), 3 E. & B. 144.

[5] *Holder* v. *Soulby* (1860), 8 C. B. N. S. 254.

CARRIERS OF GOODS.

A person, who carries goods for another, may be a gratuitous bailee or a bailee for hire; but in most cases he is what the law terms a "common carrier."

A common carrier is one who publicly offers to carry goods for any one for reward on a certain route.[1] He is bound to carry goods for any one who offers them for carriage anywhere on that route, provided that he has room in his conveyance,[2] that the goods offered are the sort of goods which he usually carries, and that the person offering them can pay a reasonable price. This is because he holds himself out to carry such goods; he exercises a public employment. If he wrongfully refuses to receive and carry goods for any one, he is liable to an action on the case for damages. "The old idea that to be a common carrier by land a man must carry between fixed *termini*, or at any rate within defined districts, has been abandoned."[3]

At common law, if goods entrusted to a common carrier were lost or destroyed in transit, the owner could recover their full value without proving any negligence on the part of the carrier or his servants. A common carrier, in fact, was treated as an insurer of the goods. This rule was first established from the fear lest such carriers should be in collusion with highwaymen.[4] "The duty of common carriers by the common law is perfectly well understood; it is a warranty safely and securely to carry; whether they be guilty of negligence or not is immaterial; the warranty is broken by the non-conveyance or non-delivery of the goods entrusted to them."[5] As some slight compensation for this wide liability, the law allowed the common carrier a lien on the goods which he carried, until he was paid his reasonable charges for carrying them.[1]

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[1] There is no such thing as a common carrier of passengers. A hansom cabman is not a common carrier even of the luggage which he carries with his fare: *Ross* v. *Hill* (1846), 2 C. B. 877.

[2] *Jackson* v. *Rogers* (1683), 2 Show. 327.

[3] *Per* Bailhache, J., in *Belfast Ropework Co.* v. *Bushell*, [1918] 1 K. B. at p. 214.

[4] See the judgment of Lord Holt, C. J., in *Coggs* v. *Bernard* (1703), 1 Smith's L. C., 12th ed., at p. 195. The rule is not derived from the Roman law, as Cockburn, C. J., clearly demonstrates in his judgment in *Nugent* v. *Smith* (1876), 1 C. P. D. at p. 428.

[5] *Per* Wilde, C. J., in *Richards* v. *L. B. & S. C. Ry. Co.* (1849), 7 C. B. at p. 858. As to the carrier's duty in regard to the goods if the consignees fail to take delivery of them, see *G. N. Ry. Co.* v. *Swaffield* (1874), L. R. 9 Ex. 132; *Mitchell* v. *Lancs. and Yorks. Ry. Co.* (1875), L. R. 10 Q. B. 256.

We must now deal with the various limitations, which have been placed upon his liability as an insurer. These limitations may be classed under three heads :—

(i.) Limitations which always existed at common law without express stipulations.

(ii.) Limitations introduced by special agreement.

(iii.) Limitations created by statute.

(i.) A carrier was at common law never liable for any loss or damage caused to goods by an "act of God." By this phrase is meant an event beyond human intervention, which cannot by reasonable foresight be anticipated or prevented, and which is due exclusively to natural causes, such as a storm of unusual violence.[2] Still "the carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails therein he becomes liable from the nature of his contract. . . . If by his default in omitting to take the necessary care loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief."[3] Moreover there are many unforeseen and unavoidable accidents, which are not the result of an "act of God." And for damage caused by any such inevitable accident a common carrier is liable, though an ordinary bailee is not.

Again, the common carrier was always free from liability for loss or damage to the goods entrusted to him, which was caused by an act of the King's enemies. By "the King's enemies" is meant public enemies, with whom the nation is at war, and not merely thieves, although these are no doubt King's enemies in a wider sense of the term. There are many kinds of *vis major* other than compulsion exercised by the King's enemies, and for damage caused by any of these a common carrier is liable, though an ordinary bailee is not.

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[1] See *ante*, pp. 28, 29 ; and *Electric Supply Stores* v. *Gaywood* (1909), 100 L. T. 855.

[2] *Briddon* v. *G. N. Ry. Co.* (1858), 28 L. J. Ex. 51.

[3] *Per* Cockburn, C. J., in *Nugent* v. *Smith* (1876), 1 C. P. D. at p. 436.

Every bailee for reward is, as we have seen, bound to take all reasonable care of the goods entrusted to him; but on a common carrier the law has cast a further responsibility—that of an insurer—in order to give due security to property. And it will be observed that the two chief cases, in which the law exempts him from so large a liability, are "both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God and the King's enemies."[1]

There is a third case, in which a common carrier is not liable at common law—that is, where the damage is caused by some vice inherent in the thing carried. It must be "that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result."[2]

> "Thus, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of oranges or other fruits in the course of the voyage, from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids, or the ordinary leakage from the casks in which the liquors are put, in the course of the voyage, or from spontaneous combustion of goods, or from their tendency to effervescence or acidity."[3]

Lastly, a common carrier was never liable at common law where the loss of, or the damage to, the goods was due to some negligence on the part of the sender, *e.g.*, where he sent a dog with an insecure collar,[4] or goods improperly packed.[5]

(ii.) In order to diminish their extensive liability at common law, it became the practice for carriers to issue notices, stating that they "would not be accountable for any property above a certain value, unless it was insured and paid for at certain extra rates at the time of delivery." If such a notice was proved to have come to the knowledge of the consignor, he was held to have consented to the conditions set out in it; and then the notice had the effect of limiting the common law liability of the carrier, but even in this case the carrier was not protected if the loss was occasioned by any wilful misconduct or gross negligence on his part; for this was held not to be within the scope of the notice or within the intention of the parties.[1] And, of course, if the carrier was guilty of any fraud which affected the contract, the customer could rescind it.[2]

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[1] *Per* Best, C. J., in *Riley* v. *Horne* (1828), 5 Bing. at p. 220.

[2] *Per* Willes, J., in *Blower* v. *G. W. Ry. Co.* (1872), L. R. 7 C. P. at p. 662; and see *Kendall* v. *L. & S. W. Ry. Co.* (1872), L. R. 7 Ex. 373.

[3] Story on Bailments, quoted with approval by Willes, J., in *Blower* v. *G. W. Ry. Co., suprà*, at pp. 663, 664; and see *Lister* v. *Lancs. and Yorks. Ry. Co.*, [1903] 1 K. B. 878.

[4] *Richardson* v. *N. E. Ry. Co.* (1872), L. R. 7 C. P. 75.

[5] *Stuart* v. *Crawley* (1818), 2 Stark. N. P. 323.

If it was clear that the customer was never aware of the notice, he was not bound by its terms. But if the customer was aware that a notice had been given limiting the liability of the carrier and did not take the trouble to read it, he was held to have assented to its terms. Hence it became the custom for the carrier merely to post up a printed notice in his office in a place where it would catch the eye of those who entered.[3] But these notices the public often did not see or did not read, and therefore the Carriers Act, 1830,[4] enacted that "No public notice shall be deemed in law to limit the liability of a common carrier." This Act applies to all common carriers of goods by land for hire in the United Kingdom, and to them alone.

The next method, which carriers adopted to limit their liability, was to print conditions on the piece of paper which they handed to the consignor when the contract of carriage was made. This piece of paper the consignor was not required to sign. Further, the conditions were often in small print on the back of the paper and escaped the notice of the consignor, who regarded the paper merely as a voucher for the goods (as is still the case where goods are deposited in the cloak-room at a railway station). Nevertheless, if the carrier had taken reasonable steps to bring the conditions to the notice of the consignor,[1] he was legally bound by them, although he had not in fact read them.[2] Hardships were often imposed on consignors by reason of this method of restricting the liability of the carrier.

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[1] A loss of goods by the felony of the carrier's servant would not necessarily have resulted from gross negligence so as to exclude the carrier from the protection afforded by his notice. See *Butt* v. *G. W. Ry. Co.* (1851), 11 C. B. 140, explained in *Metcalfe* v. *L. B. & S. C. Ry. Co.* (1858), 4 C. B. N. S. at pp. 309, 310; and *Marriott* v. *Yeoward Bros.*, [1909] 2 K. B. 987.

[2] See *Clough* v. *L. & N. W. Ry. Co.* (1871), L. R. 7 Ex. 26; cited with approval in the judgment of the Court in *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Ex. at p. 203.

[3] *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

[4] 11 Geo. IV. & 1 Will. IV. c. 68, s. 4; but see s. 1, *post*, p. 648.

In 1854, however, was passed the Railway and Canal Traffic Act, which enacted that railway and canal companies are liable for negligence or default in the carriage of goods, notwithstanding stipulations entered into to the contrary, unless such stipulations are embodied in a special contract made and signed by the sender of the goods or his agent, and are also adjudged to be just and reasonable by the Court or judge before whom any question relating thereto shall be tried.[3] The Act applies to every railway company and every canal company in the United Kingdom and to the owner or lessee of, or contractor working, any railway or canal or navigation therein constructed or carried on under the powers of any Act of Parliament.[4]

To determine what conditions are reasonable, it will be necessary to look at all the circumstances of each individual case. If the alternative to non-liability be a condition so onerous that no reasonable person could possibly adopt it, then it amounts to giving no alternative at all and it has frequently been held that, if no alternative is given, such a condition is unreasonable. "In order to judge whether the condition is reasonable or not, you must look at this consideration: Are the individual and the public sufficiently protected from being unjustly dealt with by the effect of the monopoly?"[5] The burden of showing that a condition is reasonable lies on the railway company.[6] If some of the conditions contained in a special contract are good and some bad, the good conditions may be severed from the bad and enforced. Moreover, if a railway company intends to limit its liability in this way, the terms used must be precise and unambiguous.

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[1] *Richardson* v. *Rowntree*, [1894] A. C. 217.

[2] *Parker* v. *S. E. Ry. Co.* (1877), 2 C. P. D. 416.

[3] 17 & 18 Vict. c. 31, s. 7. This section does not apply to a contract exempting a railway company from loss on a railway not belonging to or worked by the company: *Zunz* v. *S. E. Ry. Co.* (1869), L. R. 4 Q. B. 539; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

[4] *Ib.*, s. 1.

[5] *Per* Lord Blackburn, in *Manchester, Sheffield, &c., Ry. Co.* v. *Brown* (1883), 8 App. Cas. at p. 711.

[6] See *Harrison* v. *L. B. & S. C. Ry. Co.* (1860), 2 B. & S. 122, 152; *Peek* v. *North Staffordshire Ry. Co.* (1862), 10 H. L. Cas. 473.

Some railway companies insist that they "will not be responsible for loss"—which they are certainly entitled to do. But if no further words are added, it will be held that the company will only be immune from the responsibility of loss which remains unexplained—in other words, if the plaintiff can prove negligence in the company or its servants, he may recover in spite of the stipulation.[1]

"The company will not pay loss for damage unless a claim for such loss is made within" a certain time. This has been held a reasonable condition. So has "the company will not be responsible for loss of market." But if the servants of the company knew that the goods must be in the market by a certain day and neglected to send them by that day, the company is liable.

A condition contained in the contract, exempting the company from liability for loss of or injury to cattle caused by restiveness, would not relieve them from liability for damage resulting from the negligence of their servant.[2]

The doctrine as to contributory negligence may sometimes apply to relieve a carrier from liability.[3] But a condition which would exempt the company from responsibility for damage done to the goods however caused—including therefore gross negligence, and even fraud or dishonesty on the part of the servants of the company—would be neither just nor reasonable.[4]

(iii.) The liability of a common carrier at common law was modified by the Carriers Act, 1830.[5] Section 1 of this Act provides that a carrier shall not be liable for the loss of or any injury to any "parcel or package"[6] containing certain articles—when exceeding £10 in value—unless the value and nature of the article shall have been declared at the time of its delivery by the consignor, and an increased charge for carriage or a promise to pay the same accepted by the carrier.[1] The articles specified in this section are money, jewellery,[2] bills, bank-notes, securities for the payment of money,[3] pictures,[4] plate, china, silks,[5] furs or lace[6]—all articles, it will be observed, of little bulk but of considerable value. The Act only applies to carriers by land; but where one entire contract is made to carry goods over both land and sea, the contract is divisible and the carrier will be protected so far as the journey by land is concerned.[7]

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[1] See *P. & O. Steam Navigation Co.* v. *Shand* (1865), 3 Moo. P. C. C. (N. S.) 272, where the passenger failed to prove negligence, and lost the action.

[2] See *Wise* v. *G. W. Ry. Co.* (1856), 1 H. & N. 63; *Richardson* v. *N. E. Ry. Co.* (1872), L. R. 7 C. P. 75.

[3] *Gill* v. *Manchester, Sheffield, &c., Ry. Co.* (1873), L. R. 8 Q. B. 186.

[4] *Peek* v. *North Staffordshire Ry. Co.* (1862), 10 H. L. Cas. 473; *Lewis* v. *G. W. Ry. Co.* (1877), 3 Q. B. D. 195; *Forder* v. *G. W. Ry. Co.*, [1905] 2 K. B. 532; *Buckton & Co.* v. *L. & N. W. Ry. Co.* (1916), 87 L. J. K. B. 234. See further, as to what conditions are reasonable, *Doolan* v. *Midland Ry. Co.* (1877), 2 App. Cas. 792; *Manchester, Sheffield, &c., Ry. Co.* v. *Brown* (1883), 8 App. Cas. 703, 710, 716; *Cutler* v. *L. & N. W. Ry. Co.* (1887), 19 Q. B. D. 64.

[5] 11 Geo. IV. & 1 Will. IV. c. 68.

[6] As to what is a "parcel or package" within section 1, see *Whaite* v. *Lancs. & Yorks. Ry. Co.* (1874), L. R. 9 Ex. 67.

By section 2 the carrier is entitled to charge at an increased rate for the carriage of a parcel containing any of the above-mentioned articles.[8] A notice specifying such increased rate of charge must be fixed in a conspicuous part of the office or receiving house of the carrier.[9] If this be done, the consignor will be bound by the notice without any further proof being given of its having come to his knowledge. By section 3 the carrier must (if required so to do) give a receipt to the sender for the amount paid for carriage of any article the value of which has been declared as above mentioned. If he omits to give such receipt or set up such notice, he will not be entitled to any benefit under the Act, but will be responsible as at common law and liable to refund to his customer the increased rate of charge paid by him. And in every case in which an increased rate has been paid for the carriage of a parcel, the contents of which have been properly declared, the consignor may, if the parcel be lost or damaged, recover the increased charge in addition to the value of the parcel.[10]

A common carrier still remains liable as at common law for the loss of or damage to any goods to which the Act does not apply; and a notice purporting to limit his liability in respect of any such articles is invalid. But the carrier may limit his liability as to these goods by making a special contract with the consignor.[1] Nothing in the Act protects any carrier from liability for any loss to goods arising from the felonious acts of any servant in his employ, nor protects any such servant from liability for any loss or injury occasioned by his personal neglect or misconduct.[2]

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[1] *Doey* v. *L. & N. W. Ry. Co.*, [1919] 1 K. B. 623.

[2] See *Bernstein* v. *Baxendale* (1859), 6 C. B. N. S. 251.

[3] See *Stoessiger* v. *S. E. Ry. Co.* (1854), 3 E. & B. 549.

[4] See *Woodward* v. *L. & N. W. Ry. Co.* (1878), 3 Ex. D. 121.

[5] See *Brunt* v. *Midland Ry. Co.* (1864), 2 H. & C. 889.

[6] This word does not include machine-made lace: 28 & 29 Vict. c. 94, s. 1.

[7] *Le Conteur* v. *L. & S. W. Ry. Co* (1865), L. R. 1 Q. B. 54.

[8] It is incumbent on the carrier to demand—not on the customer to tender—the increased charge: *G. N. Ry. Co.* v. *Behrens* (1862), 7 H. & N. 950.

[9] S. 5.

[10] S. 7; see further as to the measure of damages in such an action, s. 9, and *Millen* v. *Brasch* (1882), 10 Q. B. D. 142.

The Act compels the consignor of goods of a particular kind to give the carrier information of their nature and value.[3] If he omits to do so, he will not be able to sue the carrier for loss of the goods, even though such loss be occasioned by gross negligence on the part of the carrier.[4] He will, however, be able to recover their value, if the loss arose through the felonious act of any servant of the carrier.[5] The owner of the goods can still recover damages if the carrier wrongfully refuses to receive them or unduly delays their delivery, whether the goods be of the description mentioned in the Act or not.[6]

The Railway and Canal Traffic Act, 1854,[7] only applies to railway and canal companies. It expressly provides that nothing therein contained shall alter or affect the rights, privileges or liabilities of any such company under the Carriers Act with respect to articles of the descriptions mentioned in that Act. It includes in its scope property not brought within the provisions of the Carriers Act, such as cattle and other animals. It enacts that every company to which it applies[8] shall be liable for negligence or default in the carriage of horses, cattle or other animals,[9] or goods, notwithstanding any notice, condition or declaration being made and given by such company contrary thereto or in anywise limiting such liability.[1] Every such notice, condition or declaration is declared to be null and void. But the Act, as we have already seen, does not prevent companies from entering into a special contract with respect to the carriage of any animals or goods which shall be adjudged by the Court to be just and reasonable, provided it is reduced into writing and signed by the consignor.

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[1] *D'Arc* v. *L. & N. W. Ry. Co.* (1874), L. R. 9 C. P. 325.

[2] S. 8; and see *Stephens* v. *L. & S. W. Ry. Co.* (1886), 18 Q. B. D. 121; *Marriott* v. *Yeoward Bros.*, [1909] 2 K. B. 987.

[3] *Hart* v. *Baxendale* (1851), 6 Exch. 769.

[4] The precise meaning of the term "gross negligence" is explained in *Austin* v. *Manchester, Sheffield, &c., Ry. Co.* (1850), 10 C. B. 474, 475.

[5] *Vaughton* v. *L. & N. W. Ry. Co.* (1874), L. R. 9 Ex. 93; *M'Queen* v. *G. W. Ry. Co.* (1875), L. R. 10 Q. B. 569.

[6] *Hearn* v. *L. & S. W. Ry. Co.* (1855), 10 Exch. 793; *Pianciani* v. *L. & S. W. Ry. Co.* (1856), 18 C. B. 226.

[7] 17 & 18 Vict. c. 31.

[8] See s. 1, *ante*, p. 647. Where section 7 does not apply, the liability of the company may have to be determined by reference to the ordinary law of bailment: see *Richardson* v. *N. E. Ry. Co.* (1872), L. R. 7 C. P. 75, 81.

[9] A dog is within these words: *Harrison* v. *L. B. & S. C. Ry. Co.* (1860), 2 B. & S. 122, 152. See *Ashenden* v. *L. B. & S. C. Ry. Co.* (1880), 5 Ex. D. 190; *Dickson* v. *G. W. Ry. Co.* (1886), 18 Q. B. D. 176.

No greater damages can be recovered for the loss of, or for any injury done to, any animal beyond the sum specified in the Act—that is to say, for any horse, £50 ; for any neat cattle, per head, £15 ; for any sheep or pig, per head, £2—unless the consignor at the time he delivers any such animal to the company declares it to be of higher value than that mentioned in the Act. If he so declares it, the company can demand from him, as compensation for the increased risk, a reasonable percentage upon the excess of the value so declared upon the sums just named ; and this must be paid in addition to the ordinary rate of charge. The amount of such percentage or increased rate of charge must be notified in the manner prescribed in the Carriers Act. It lies upon the person claiming compensation to prove the value of such animals or goods, and the amount of injury done to them.

Questions of difficulty often arise as to whether the lost or injured goods were at the time of such loss or injury in the custody of a railway company as carriers ;[2] whether the goods were delivered by the consignor in accordance with the known course of business of the company ;[3] whether the goods were accepted or dealt with on behalf of the company by its servant or agent duly authorised and acting within the scope of his powers. When once a railway company has held itself out to be a common carrier, it is under a common law liability to carry to all places to which it professes to carry,[4] even if one of those places should be beyond the confines of the realm,[5] and to accept all goods which are reasonably offered to it for conveyance to and from the places to which it professes to carry, whether one of those places be without the realm or not. But neither by common law nor under the Railway and Canal Traffic Act is a railway company under any liability to carry goods otherwise than according to its profession.[1]

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[1] A passenger's luggage is within the above words : *Cohen* v. *S. E. Ry. Co.* (1877), 2 Ex. D. 253.

[2] See *Giles* v. *Taff Vale Ry. Co.* (1853), 2 E. & B. 822. As to when common carriers cease to be such and become warehousemen, see *Chapman* v. *G. W. Ry. Co.* (1880), 5 Q. B. D. 278.

[3] *Slim* v. *G. N. Ry. Co.* (1854), 14 C. B. 647.

[4] *Denton* v. *G. N. Ry. Co.* (1856), 5 E. & B. 8 ; and see *Smith & Sons* v. *L. & N. W. Ry. Co.* (1918), 35 Times L. R. 99.

[5] *Crouch* v. *L. & N. W. Ry. Co.* (1854), 14 C. B. 255, 290.

When a railway company undertakes to deliver goods to a consignee beyond the limits of its own line, a special contract declaring that it will not be responsible for any loss of or damage done to such goods beyond those limits will relieve the company from liability.[2] But in the absence of any such special contract, the rule is that the company, to whom the goods are handed and with whom the contract of carriage was made, is liable for their non-delivery in an action brought on the contract. The forwarding company cannot be sued in an action of contract, and it will only be liable to an action of tort if it can be shown that the goods were lost on its line and through its negligence.[3] Where a company, by through booking, contracts to carry any animals or goods from place to place, partly by railway or canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage by sea from "the act of God, the King's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers and navigation of what nature and kind soever" will, if published conspicuously in the office where such through booking is effected, and if legibly printed on the receipt or freight note given by the company for the animals, luggage or goods, be valid as part of the contract between the consignor and the company, in like manner as if the company had signed and delivered to the consignor a bill of lading containing such condition.[4] And where a railway company works steam vessels in connection with its land traffic, the provisions of the Railway and

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[1] *In re Oxlade and N. E. Ry. Co.* (1864), 15 C. B. N. S. 680.

[2] *Fowles* v. *G. W. Ry. Co.* (1852), 7 Exch. 699; and see *Foulkes* v. *Metropolitan Ry. Co.* (1880), 5 C. P. D. 157, overruling, on this point, *Mytton* v. *Midland Ry. Co.* (1859), 4 H. & N. 615.

[3] See *ante*, pp. 429, 430.

[4] 31 & 32 Vict. c. 119, s. 14. And see Carriage of Goods by Sea, *post*, p. 910.

Canal Traffic Act, so far as applicable, have been extended to such steamers and the traffic carried on thereby.[1]

When goods have arrived at their destination, the practice of railway companies is to send an "advice note" to the consignee as an intimation that the goods have arrived. This advice note is sent as soon as possible, for it informs the consignee that, if the goods are not fetched away, the company will only keep them as warehousemen and not as carriers, the difference being that in the former case their liability depends on negligence and is not, as it would be in the latter case, an absolute liability. The railway company's contract is to carry the goods and also to keep them a reasonable time after they have arrived at their destination; but if they are not fetched away within such reasonable time, the company can make an extra charge.

RAILWAY PASSENGERS.

A railway company is not a common carrier of its passengers; it is not an insurer of human beings. Hence any one who is injured in a railway accident cannot recover damages from the company without proving negligence.

There is very little statute law dealing with passengers. The Railway and Canal Traffic Act, 1854, enacts that every railway company, so far as its own line is concerned,[2] must afford "reasonable facilities for the conveyance of traffic."[3] Proceedings are often taken before the Railway and Canal Commissioners to enforce this duty. The word "traffic" includes passengers, and it has been held that the term "reasonable facilities" includes a cloak-room, a waiting-room and a platform of sufficient length.[4]

When a passenger takes a ticket from A. to B., the company contract to carry him, and also a certain amount of his personal luggage, safely and securely from A. to B. This contract is almost invariably made subject to certain conditions, and the passenger is often unaware of the terms which are thus incorporated into his contract. He is not bound by any conditions, unless he has been given a reasonable opportunity of learning that there are conditions.[1] If the ticket is on the face of it a complete contract in itself with nothing to show that there is anything more—as, for instance, where the only words on the face of the ticket were "Dublin to Whitehaven"—then the fact that there are conditions on the back limiting the company's liability will not affect the contract.[2] And where the conditions were printed in small type with other matter stamped in red ink across them, it was held that a steerage passenger was not bound by them.[3] In all such cases the proper questions to be left to the jury are:—

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[1] 26 & 27 Vict. c. 92, s. 31. Where the vessel is not owned by or worked by the company, see 31 & 32 Vict. c. 119, s. 12; 51 & 52 Vict. c. 25, s. 28; and 57 & 58 Vict. c. 60, ss. 502, 503.

[2] *Zunz* v. *S. E. Ry. Co.* (1869), L. R. 4 Q. B. 539.

[3] 17 & 18 Vict. c. 31, s. 2.

[4] See *Singer Manufacturing Co.* v. *L. & S. W. Ry. Co.*, [1894] 1 Q. B. 833, 836; *S. E. Ry. Co.* v. *Railway Commissioners* (1881), 6 Q. B. D. 586.

(i.) Did the passenger know that there was writing or printing on the ticket?

(ii.) Did he know that the writing or printing contained conditions?

(iii.) Did the company do what was reasonably sufficient to give him notice as to what these conditions were?[3]

Again, a railway company may make conditions limiting its liability for unpunctuality; but it must exercise reasonable care and diligence to ensure that its trains arrive at the times stated in its time tables. It is not possible to reckon in minutes the exact extent to which unpunctuality is reasonable: there is no such thing as "reasonable time" in the abstract. The question must be answered by reference to the circumstances of each particular case.[4] The mere fact that a train started or arrived late does not prove that the company did not take reasonable care; nor does it give a passenger the right to take a special train, however important may be the appointment which he has to keep.[1]

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[1] *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

[2] *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470.

[3] See *Richardson* v. *Rowntree*, [1894] A. C. at pp. 219, 221; *Hood* v. *Anchor Line, Ltd.*, [1918] A. C. 837.

[4] As to delay caused by a strike, see *Hick* v. *Raymond & Reid*, [1893] A. C. 22; *Hulthen* v. *Stewart & Co.*, [1903] A. C. 389; *Sims & Co.* v. *Midland Ry. Co.*, [1913] 1 K. B. 103.

Railway companies usually guard themselves by conditions against liability for any inconvenience caused to a passenger by failure to provide sufficient seating accommodation. But apart from such conditions a passenger can always demand to be carried. That the compartment is overcrowded may be evidence of negligence; and the company is liable for the reasonable and probable consequences of such overcrowding.[2]

The company is also liable for injuries caused to a passenger in alighting at his destination, when an invitation to alight has been given by one of the company's servants. But the mere fact that the train stops is not such an invitation; it would be otherwise if the train stopped and a porter called out the name of the station.

Innumerable conditions are attached to the issue of cheap tickets; and these are often strictly enforced. Thus, if a man takes a cheap ticket from A. to B., he is not entitled to travel beyond B. to C., and there to give up his ticket and pay the fare from B. to C. He has to pay the difference between the two fares A. to C. and A. to B.[3] Again, if he takes a ticket from L. to M., he cannot travel from L. to N. with that ticket, although the fares for the two journeys are the same.[4] Nor is he entitled to break his journey at any place *en route*, unless he has leave to do so.[5]

PASSENGERS' LUGGAGE.

A railway company is, as we have seen, a common carrier of goods over land so far as its ordinary goods traffic is concerned. It is also a common carrier in respect of a passenger's personal luggage. It is often said that railway companies carry a certain amount of passenger's luggage free.

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[1] *Le Blanche* v. *L. & N. W. Ry. Co.* (1876), 1 C. P. D. 286; and see *Hick* v. *Raymond*, [1891] 2 Q. B. 626, affirmed in the House of Lords, [1893] A. C. 22; *Sims & Co.*, v. *Midland Ry. Co.*, [1913] 1 K. B. 103.

[2] *Cobb* v. *G. W. Ry. Co.*, [1894] A. C. 194.

[3] *G. N. Ry. Co.* v. *Palmer*, [1898] 1 Q. B. 162; cf. *Clarke* v. *West Ham Corp.*, [1909] 2 K. B. 858.

[4] *G. W. Ry. Co.* v. *Pocock* (1879), 41 L. T. 415.

[5] *Ashton* v. *Lancs. & Yorks. Ry. Co.*, [1904] 2 K. B. 313; *L. & N. W. Ry. Co.* v. *Hinchcliffe*, [1903] 2 K. B. 32.

But this is not a correct statement of the law; for, if it were true, the bailment would be gratuitous and the company would only be liable for gross negligence. The company is really a bailee for hire, and can be sued for loss of or damage to the personal luggage of a passenger. Moreover, the *onus* is on the company to show that it was not guilty of any negligence.[1] But where non-personal luggage is delivered to the company as personal luggage, it is under no duty to take care of it, unless it was accepted with the knowledge that it was not personal luggage.

Tramway and omnibus companies are not bound to carry passengers' luggage; but on railway companies the obligation has been imposed by Parliament, and in nearly all cases a clause to that effect is to be found in the company's Private Act.

The Courts have declined to give any precise definition of "personal luggage." But the term "comprises clothing, and such articles as a traveller usually carries with him for his personal convenience"[2]—in fact, everything which a passenger takes with him according to the habits of the class to which he belongs.[3] There are many things which the Courts have decided not to be personal luggage, such as a rocking-horse,[4] furniture, household linen,[5] merchandise,[6] and even the samples of a commercial traveller.[7] And the liability of a railway company for the personal luggage of its passengers will, of course, be subject (a) to the provisions of the Carriers Act; (b) to the terms of any special contract which may have been entered into; and (c) to the by-laws of the company, and the rules and regulations made under the powers conferred upon it.[8]

If the luggage of a passenger is at his request placed in the carriage with him, the company's contract to carry it safely is subject to an implied condition that the passenger himself will take ordinary care of it, and should his negligence cause the loss of the luggage, the company will not be answerable for it.[1] Indeed, it has been held that a railway company is not an insurer of such luggage and is not liable, unless the passenger can prove negligence on its part.[2] So long as the luggage which a passenger intends to take with him in the train is in the custody of a porter at a railway station, either at the commencement or conclusion of the journey, the railway company is a common carrier of it, but while it is in the carriage and partially under the control of the passenger, the railway company is not a common carrier, but is liable for negligence only.[3]

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[1] *Hooper* v. *L. & N. W. Ry. Co.* (1880), 50 L. J. Q. B. 103.

[2] *Per* Parke, B., in *G. N. Ry. Co.* v. *Shepherd* (1852), 8 Exch. at p. 38.

[3] See *Jenkyns* v. *Southampton, &c., Steam Packet Co.*, [1919] 2 K. B. 135.

[4] *Hudson* v. *Midland Ry. Co.* (1869), L. R. 4 Q. B. 366.

[5] *Macrow* v. *G. W. Ry. Co.* (1871), L. R. 6 Q. B. 612.

[6] *Cahill* v. *L. & N. W. Ry. Co.* (1861), 10 C. B. N. S. 154; (1863), 13 *Ib.* 818; and see *Belfast and Ballymena, &c., Ry. Co.* v. *Keys* (1861), 9 H. L. Cas. 556; *Phelps* v. *L. & N. W. Ry. Co.* (1865), 19 C. B. N. S. 321.

[7] *Wilkinson* v. *Lancs. & Yorks. Ry. Co.*, [1906] 2 K. B. 619.

[8] See *Williams* v. *G. W. Ry. Co.* (1854), 10 Exch. 15 (where a by-law unduly restricting the liability of the defendants was held bad).

Where a passenger has delivered his luggage to one of the servants of the company to be labelled and placed in the luggage van for the purpose of conveyance, the company will, at common law, be clearly responsible if it be subsequently missing.[4] The action is here founded on the breach of duty, not on contract; hence a servant can sue for the loss of his luggage, although his fare was paid by his master with whom he was travelling.[5] An action will also lie at the suit of the master, where property belonging to him is carried as the servant's personal luggage and is damaged through the fault of the railway company.[6]

If the luggage travels by the same train as the passenger, but not under his control, it is the duty of the railway company when the luggage reaches its destination to have it ready for delivery upon the platform at the usual place of delivery, until the owner, exercising due diligence, can claim it; and the liability of the company does not cease before the expiration of a reasonable time allowed for such purpose.[1] Where, moreover, the company is in the habit of delivering a passenger's luggage at the end of a journey in a particular manner with a view to his convenience—as by employing porters to carry it across the platform to the cab rank—the company's liability as carriers will continue until the porters have so discharged their duty, unless there be proof either of an agreement by the plaintiff to accept a delivery of his luggage short of the ordinary delivery, or that the porter was deputed or specially employed by the plaintiff to convey the luggage to some place outside the company's premises.[2] In any such case, however, some evidence of the non-performance of the defendant's contract must be given by the plaintiff, so as to shift the burden of proof.

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[1] *Talley* v. *G. W. Ry. Co.* (1870), L. R. 6 C. P. 44.

[2] *Bergheim* v. *G. E. Ry. Co.* (1878), 3 C. P. D. 221. But see *Bunch* v. *G. W. Ry. Co.* (1888), 13 App. Cas. 31.

[3] See the judgment of Lord Esher, M. R., in *Bunch* v. *G. W. Ry. Co.* (1886), 17 Q. B. D. 218—224 (affirmed (1888), 13 App. Cas. 31), and *Soanes* v. *L. & S. W. Ry Co.* (1919), 88 L. J. K. B. 524.

[4] *G. W. Ry. Co.* v. *Goodman* (1852), 12 C. B. 313.

[5] *Marshall* v. *York, Newcastle, &c., Ry. Co.* (1851), 11 C. B. 655; *Austin* v. *G. W. Ry. Co.* (1867), L. R. 2 Q. B. 442.

[6] *Meux* v. *G. E. Ry. Co.*, [1895] 2 Q. B. 387.

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[1] *Patscheider* v. *G. W. Ry. Co.* (1878), 3 Ex. D. 153, 156; distinguished in *Hodkinson* v. *L. & N. W. Ry. Co.* (1884), 14 Q. B. D. 228.

[2] *Richards* v. *L. B. & S. C. Ry. Co.* (1849), 7 C. B. 839; *Butcher* v. *L. & S. W. Ry. Co.* (1855), 16 C. B. 13; *Kent* v. *Midland Ry. Co.* (1874), L. R. 10 Q. B. 1.

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